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This is the twenty-fourth All England Law Reports Annual Review and as in previous years it is designed as a companion to the All England Law Reports. A number of academic lawyers have been invited to contribute articles evaluating the decisions of the courts relevant to their particular speciality and reported in that series in 2005. Not all of the cases, of course, fall neatly into one or other of the categories of conventional legal classification. The authors have tried to avoid duplication in their discussion of cases and there are a number of cross-references to be found in the articles. Some cases, however, are examined in more than one article because different aspects are of importance in different contexts. Other cases, not actually reported in the All England Reports, have been referred to where this has been considered worthwhile.

Cases from the 2005 All England Law Reports, All England Law Reports European Cases, All England Law Reports Commercial Cases, the daily online All England Reporter service (represented by the citation All ER (D)), Simon's Tax Cases, and Butterworths Company Law Cases are printed in bold type in the Table of Cases.

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Contributors

Administrative Law

Keith Davies, JP, MA, LL.M, Hon Assoc RICS,
Barrister, Professor Emeritus,
University of Reading

Arbitration

Salim A H Moollan,
Ancien élève de l'École Polytechnique, Diplômé
de l'Institut d'Études Politiques de Paris, MA
(CANTAB), Barrister, Essex Court Chambers

Commercial Law

Robert Merkin, LL.B, LL.M,
Professor of Commercial Law, University of
Southampton; Consultant, Barlow Lyde &
Gilbert

Company Law

Jennifer Payne, MA, Solicitor,
Travers Smith Lecturer in Corporate Finance
Law, University of Oxford and Fellow of
Merton College, Oxford

Conflict of Laws

Pippa Rogerson, MA, PhD (CANTAB),
Fellow, Gonville & Caius College; Senior
Lecturer, Cambridge University

Consumer Law and Contempt of Court

C J Miller, BA, LL.M, Barrister,
Emeritus Professor of Law, University of
Birmingham

Contract

Michael Furmston, TD, BCL, MA, LL.M,
Bencher of Gray's Inn, Emeritus Professor of
Law and Senior Research Fellow, University of
Bristol

Criminal Law

Alan Reed, MA, LL.M, Solicitor,
Editor of the Journal of Criminal Law;
Professor of Criminal and Private International
Law, University of Sunderland

Criminal Procedure and Sentencing

G J Bennett, MA, Barrister,
Professor of Law, University of Notre Dame

Employment Law

I T Smith, MA, LL.B (CANTAB), Barrister,
Clifford Chance Professor of Employment Law,
University of East Anglia

European Union Law

Catherine Barnard, MA, LL.M,
Trinity College, Cambridge

Evidence

John Jackson, BA, LL.M, Barrister-at-Law,
Professor of Public Law, Queen's University,
Belfast

Katie Quinn, LL.B, MSc,
Lecturer in Law, Queen's University, Belfast

Extradition and Prisons

I M Yeats, BCL, MA, Barrister,
Senior Lecturer in Law, Queen Mary, University
of London

Family Law

Jonathan Herring, MA, BCL
Fellow in Law, Exeter College, University of
Oxford

Land Law and Trusts

P J Clarke, BCL, MA,
Fellow and Tutor in Law, Jesus College, Oxford

Landlord and Tenant

Philip H Pettit, MA, Barrister,
Emeritus Professor of Equity, Universities of
Bristol and Buckingham

Medical Law

Vivienne Harpwood, LL.B, Barrister,
Professor of Law, Cardiff Law School, Cardiff
University

Practice and Procedure

A A S Zuckerman, LL.M, MA,
Fellow of University College, Oxford

Restitution

James Edelman, B Comm (Murd) B Ec, LL.B
(Hons) (UWA); MA, DPhil (Oxon),
Fellow in Law, Keble College; Adjunct Professor
University of Western Australia
Charles Mitchell, BA, Dip Law, LL.M, PhD,
Professor of Law, King's College London

Shipping Law

Robert P Grime, BA, BCL,
Emeritus Professor of Maritime Law, University
of Southampton

Solicitors

Frances J Silverman, LL.M
Solicitor

Sport and the Law

Edward Grayson, MA (OXON), Barrister,
Visiting Professor, Sport and the Law, Anglia
Polytechnic University; Founder President,
British Association for Sport and Law; Member
of the Bar Sports Group; Fellow of the Royal
Society of Medicine

Statute Law

Francis Bennis, MA (OXON)
Barrister, Research Associate of the University
of Oxford Centre for Socio-Legal Studies,
former UK Parliamentary Counsel and Lecturer
and Tutor in Law at St Edmund Hall, Oxford

Succession

Christopher Sherrin, LL.M, PhD, Barrister,
Professor of Law, University of Hong Kong

Taxation

John Tiley, CBE, LL.D, MA, BCL,
Professor of the Law of Taxation, University of
Cambridge; Fellow of Queens' College,
Cambridge

Tort

Alastair Mullis, LL.B, LL.M,
Dean and Professor in Law, University of East
Anglia

Donal Nolan, MA, BCL,
Fellow and Tutor in Law, Worcester College,
Oxford

Town and Country Planning

Paul B Fairest, MA, LL.M,
Formerly Professor of Law, University of Hull

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Abbreviations

ACT	Advance Corporation Tax
Aust Tort Reps	Australian Tort Reports
BCLC	Butterworths Company Law Cases
BMJ	British Medical Journal
BMLR	Butterworths Medico-Legal Reports
BTR	British Tax Review
CAA	Capital Allowances Act
CGTA	Capital Gains Tax Act
CJQ	Civil Justice Quarterly
CL	Current Law
Cl & Fin	Clark and Fennelly's Reports
CLJ	Cambridge Law Journal
CLP	Current Legal Problems
CLR	Commonwealth Law Reports
CMLRev	Common Market Law Reports
Con LR	Construction Law Reports
Conv	The Conveyancer
Cr App R	Criminal Appeal Reports
Crim LR	Criminal Law Review
DLR	Dominion Law Reports
DLT	Development Land Tax
EAT	Employment Appeal Tribunal
ECR	European Court Reports
EG	Estates Gazette
EGLR	Estates Gazette Law Reports
EHRR	European Human Rights Reports
F&F	Foster and Finlason's Reports
FA	Finance Act
Fam Law	Family Law
FCR	Family Court Reporter
FLR	Family Law Reports
FSR	Fleet Street Reports
HLR	Housing Law Reports
ICLQ	International and Comparative Law Quarterly
ICR	Industrial Cases Reports
IHTA	Inheritance Tax Act
ILJ	Industrial Law Journal
ILM	International Legal Materials

ILR	International Law Reports
Imm AR	Immigration Appeals Reports
IRLR	Industrial Relations Law Reports
JP	Justice of the Peace Reports
LGR	Local Government Review
Lloyd's Rep	Lloyd's List Reports
LMCLQ	Lloyd's Maritime and Commercial Law Quarterly
LPA	Law of Property Act
LQR	Law Quarterly Review
LRA	Land Registration Act
LS	Legal Studies
LSG	Law Society Gazette
Mac & G	Macnaghten and Gordon's Reports
MCA	Matrimonial Causes Act
MLJ	Malayan Law Journal
MLR	Modern Law Review
MedLR	Medical Law Reports
NILQ	Northern Ireland Law Quarterly
NLJ	New Law Journal
NLJR	New Law Journal Law Reports
NZLR	New Zealand Law Reports
OJLS	Oxford Journal of Legal Studies
P & CR	Property and Compensation Reports
PACE	Police and Criminal Evidence Act
PCC	Palmer's Company Cases
PL	Public Law
PLR	Planning Law Reports
RLR	Restitution Law Review
RTR	Road Traffic Reports
SC	Session Cases
SJ	Solicitors' Journal
SLT	Scots Law Times
STC	Simon's Tax Cases
TA	Income and Corporation Taxes Act
TC	Tax Cases
TCGA	Taxation of Chargeable Gains Act
TMA	Tax Management Act
TruLI	Trust Law International

Administrative Law

KEITH DAVIES, JP, MA, LL.M., Hon Assoc RICS
Barrister, Professor Emeritus, University of Reading

Protective costs orders in public law

The need

[1.1] The most chilling aspect of litigation is not the facts, the law, the outcome or even the participants, but the costs. In Chapter 65 of *Bleak House* Charles Dickens describes the dispute in *Jarndyce v Jarndyce* over a large inheritance at last reaching its end in Chancery. ‘“Do I understand that the whole estate is found to have been absorbed in costs? Hem! I believe so”, returned Mr. Kenge’, of Kenge & Carboy, Solicitors, of Lincoln’s Inn.

[1.2] The law is supposed to exist to do right and bring justice to all. But: ‘Agree with thine adversary ... whiles thou art in the way with him’ – ie the way to court. If not: ‘Thou shalt by no means come out thence till thou hast paid the uttermost farthing.’ (St Matthew, Chap 26, vv 25–26). Law is about conflict, an expensive activity.

[1.3] Nowadays there are ways of lessening this risk. One recent contrivance is the ‘protective costs order’ (PCO). The question arose: what part can these orders play in public law? A large answer is given in *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, [2005] 4 All ER 1 (see also [19.42] below). The applicant sought judicial review, and asked for a PCO because of limited funds. Davis J refused to grant the PCO for the substantive hearing; but an application was then made to the Court of Appeal, which granted the PCO. The parties reached agreement on a consent order as to the substantive claim, which was thus never judicially determined; but the Court of Appeal decided to give its reasons for upholding the PCO. (For another case in which an appeal was heard despite a settlement see *Bowman v Fels* [2005] EWCA Civ 226, [2005] 1 All ER 609, discussed at [23.10]–[23.12] below.) The following extracts are all taken from the definitive and detailed judgment in the case delivered by Lord Phillips of Worth Matravers MR (though prepared by Brooke LJ).

The courts’ jurisdiction over litigation costs

[1.4]

‘Because this was the first occasion on which issues relating to PCOs had been considered in depth by this court (since an appeal to this court was

likely whatever decision the judge had made), the judge permitted the Public Law Project to intervene by placing before him a substantive generic submission ... which set out reasons, supported by authority, why the courts should now be willing to adopt a more relaxed approach than hitherto when invited to make PCOs in public law cases which raise issues of general public importance.’ (at [4])

[1.5]

‘It will be convenient to structure this judgment by considering the relevant law first, and then to explain why we considered that it was appropriate to grant a PCO on the facts of this particular case. The general purpose of a PCO is to allow a claimant of limited means access to the court in order to advance his case without the fear of an order for substantial costs being made against him, a fear which would inhibit him from continuing with the case at all.’ (at [6])

[1.6]

‘... it has been traditionally accepted in the courts of England and Wales that costs follow the event ... “The court’s jurisdiction to deal with litigation costs is based upon s 51 of the Supreme Court Act 1981, which, with some rearrangement of the words, is derived from s 5 of the Supreme Court of Judicature Act 1890: ‘(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in ... (b) the High Court ... shall be in the discretion of the court ... (3) The court shall have full power to determine by whom and to what extent the costs are to be paid.’”’ (at [7]–[8], quoting Hoffmann LJ in *McDonald v Horn* [1995] 1 All ER 961 at 968–969)

[1.7]

‘In *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] 2 All ER 409, [1986] AC 965 the House of Lords drew attention to the broad language of s 51 of the 1981 Act. The policy, said Lord Goff, was to confer jurisdiction in wide terms—“thus ensuring that the court has, so far as possible, freedom of action, leaving it to the rule-making authority to control the exercise of discretion (if it thinks it right to do so) by the making of rules of court, and to the appellate courts to establish principles on which the discretionary power may, within the framework of the statute and the applicable rules of court, be exercised.”’ (at [8])

[1.8]

‘RSC 1883, Ord LXV, provided that:

“Subject to the provisions of the Acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or Judge ...”

The rule also provided for the right of an executor, administrator, trustee or mortgagee “who has not unreasonably instituted or carried on or resisted any proceedings” to costs out of the particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division.’ (at [15]–[16])

[1.9]

‘These then, were the prevailing trends over the years in private law litigation in the civil and family courts. There have been some distinctive features in the past, so far as the Crown and other public bodies were concerned. Official bodies, for instance, would often appear or intervene in public law proceedings on the basis that they were present to assist the court in an *amicus curiae* role, even if they were respondents in the proceedings, and in that capacity, in a court which traditionally ordered only one set of costs, it would neither apply for costs nor expect an order for costs to be made against it, even if its submissions favoured one side more than the other. Examples of this practice were recently given by Brooke LJ in *R (on the application of Davies) v Birmingham Deputy Coroner* [2004] EWCA Civ 207, [2004] 3 All ER 543, [2004] 1 WLR 2739: justices, tribunals, coroners and the Central Arbitration Committee were cited as examples.’ (at [24])

[1.10]

‘From time to time leave to appeal to the House of Lords was given to a public body like the Inland Revenue on terms that they would pay both sides’ costs in the House of Lords and not seek to disturb the orders for costs made in the court below. *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141, [1982] 1 WLR 1155 provides just one example of this practice. Similar orders have been made in this court recently in cases where the appellants wished to have a point of law authoritatively determined and might not have been granted permission to appeal in the ordinary course of things.’ (at [25])

*Protective costs orders: the historical setting in public law***[1.11]**

‘The present appeal is concerned not with the incidence of costs in private law civil or family litigation or with statutory (or other) appeals, but with the incidence of costs in a judicial review application at first instance. Over the last 20 years there has been a growing feeling in some quarters, both in this country and in common law countries abroad which have adopted the “costs follow the event” regime, that access to justice is sometimes unjustly impeded.’ (at [28])

[1.12]

‘In 1989 Toohey J, a member of the High Court of Australia, raised a quite new question in his address to a conference of the Australian National Environmental Law Association. He observed that the awarding of costs was a factor that loomed large in any consideration to institute litigation, and that addressing the issue of standing on its own in what he called “public interest” cases was grossly insufficient without considering issues of costs:

“Relaxing the traditional requirements of standing may be of little significance unless other procedural reforms are made. There is little point in opening doors to the courts if litigants cannot afford to come in ... The fear, if unsuccessful, of having to pay the costs of the

other side—with devastating consequences to the individual or environmental group bringing the action—must inhibit the taking of the case to court.”’ (at [31])

[1.13]

‘This early stirring of the germ which was to become known as a protective costs order did not feature in the suggestions about costs which were canvassed by the Law Commission in its consultation paper *Administrative Law: Judicial Review and Statutory Appeals* (Law Com no 126) (1993) pp 67–70 (paras 11.1–11.14).’ (at [32])

[1.14]

‘In *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611, [1995] 1 WLR 386 the Divisional Court permitted the applicants to challenge the legality of the expenditure of aid and trade provision on the Pergau Dam project in Malaysia pursuant to the Overseas Development and Co-operation Act 1980. After referring to the increasingly liberal approach to standing that the courts had adopted in the previous 12 years, Rose LJ said that the merits of the challenge were “an important, if not dominant, factor when considering standing” (see [1995] 1 All ER 611 at 620, [1995] 1 WLR 386 at 395). He then cited Professor Wade in *Administrative Law* (7th edn, 1994) p 712:

“... the real question is whether the applicant can show some substantial default or abuse, and not whether his personal rights or interests are affected.”’ (at [35])

[1.15]

‘In *R v Secretary of State for the Environment, ex p Shelter* [1997] COD 49 Carnwath J refused to make a costs order against Shelter on the grounds that: (i) there were already pending before the court a sequence of individual cases raising precisely the same issue; (ii) the legal question raised was of genuine public interest; (iii) the applicant’s involvement had assisted the court in determining the issue speedily; and (iv) had the matter been determined in separate proceedings, it was likely that any applicant would have been legally aided, and thus the burden of his/her costs would have fallen upon the taxpayer and the respondent would not have obtained an order for his costs.’ (at [39])

[1.16]

‘In *R v Crown Court at Merthyr Tydfil, ex p Chief Constable of Dyfed Powys* [[1998] All ER (D) 559] Lightman J quashed an order for costs that had been made against the chief constable in the Crown Court in favour of a successful appellant at a licensing appeal. He said that the “costs follow the event” principle did not apply in a case where the police were merely placing before the court matters which it was material for the court to know. Such an order could only be made if it could be shown that the police’s position had been totally unreasonable or prompted by some improper motive.’ (at [40])

[1.17]

‘Some of the authorities that we have considered thus far demonstrate a trend towards protecting litigants, who reasonably bring public law proceedings in the public interest, from the liability to costs that falls, as a general rule, on an unsuccessful party. The making of a PCO was a substantial further step in the same direction.’ (at [41])

[1.18]

‘In *R v Lord Chancellor, ex p Child Poverty Action Group* [1998] 2 All ER 755, [1999] 1 WLR 347 (*Ex p CPAG*) Dyson J heard two applications for PCOs at the same time. The Child Poverty Action Group sought a PCO to enable it to continue judicial review proceedings for the purpose of requiring the Lord Chancellor to reconsider the way he exercised his power under s 14(2) of the Legal Aid Act 1988 in relation to the extension of legal aid to cover at least some cases before social security tribunals and commissioners. At the same time Amnesty International UK sought a similar order in relation to its legal challenge to a decision made by the Director of Public Prosecutions not to prosecute two individuals for possession of an electro-shock baton without the requisite licence.’ (at [44])

[1.19]

‘It was conceded by both respondents that the court possessed jurisdiction to make a PCO, but there was no agreement as to the principles on which the jurisdiction should be exercised. It was common ground, following *McDonald v Horn* [see above at [1.6]] that a PCO would not be available in a private law action. Dyson J said ([1998] 2 All ER 755 at 758, [1999] 1 WLR 347 at 349) that the main question of principle he had to determine was whether different considerations of public policy applied in cases which could aptly be characterised as “public interest” challenges.’ (at [45])

[1.20]

‘After analysing the arguments, Dyson J said that it was only in the most exceptional circumstances that the discretion to make a PCO should be exercised in a case involving a public interest challenge. He went on to say ([1998] 2 All ER 755 at 766, [1999] 1 WLR 347 at 358) that: (i) the court must be satisfied that the issues raised are truly ones of general public importance; (ii) the court must be satisfied, following short argument, that it has a sufficient appreciation of the merits of the claim that it can be concluded that it is in the public interest to make the order; (iii) the court must have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue; (iv) the court will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in so doing.’ (at [46])

[1.21]

‘In *R v (on the application of Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2712 (Admin), [[2002] All ER (D) 254 (Dec)] the

Divisional Court (Simon Brown LJ and Maurice Kay J) made a PCO in favour of the claimants to the extent that any award of costs against them should be capped in the sum of £25,000. They were seeking an advisory declaration to the effect that UN Security Council Resolution 1441 did not authorise the use of force against Iraq in the event of a breach of that resolution. Although the order was being sought before permission to apply for judicial review had been granted, Simon Brown LJ found that all the *Ex p CPAG* tests were satisfied, and that it was right to afford the claimants the relatively limited security that the order would afford them. Maurice Kay J, agreeing, suggested a procedure by which applications of this kind should be made in future.’ (at [49])

[1.22]

‘In *R (on the application of the Refugee Legal Centre) v Secretary of State for the Home Dept* [2004] EWCA Civ 1481, [[2004] All ER (D) 201 (Nov)] this court set a day aside to consider whether a PCO should be granted in favour of the claimants in relation to a substantive appeal in a matter in which they had been protected by an undertaking by the Home Office not to seek an order for costs against them at first instance. In the event the court made a PCO by consent. The previous week Brooke LJ had made a PCO in their favour to cover the PCO hearing before the full court, on the clear understanding that they would not be looking for their costs against the Secretary of State if they were to win. The claimants’ lawyers had been acting pro bono throughout, and their clients were an independent not-for-profit charity which had overall responsibility for ensuring the delivery of quality legal services to those seeking human rights protection. What was under challenge was the fairness of the very streamlined new arrangements for processing asylum seekers’ claims at Harmondsworth (see [2004] EWCA Civ 1239 at [3]–[9] for a description of the scheme) which clearly warranted the scrutiny of this court.’ (at [50])

Other jurisdictions

[1.23]

‘In *Village Residents’ Association Ltd v An Bord Pleanala* [2000] IEHC 34, [2000] 4 IR 321 Laffoy J was concerned with (and dismissed) the first application for a PCO in the High Court of Ireland. She said that she was satisfied that there was jurisdiction to make such an order, but that it was difficult in the abstract to identify the type or types of cases in which the interests of justice would require the court to deal with costs in the manner indicated by a PCO and it would be unwise to attempt to do so. She said that the principles set out in Dyson J’s judgment in *Ex p CPAG* seemed to meet the fundamental rubric that the interests of justice should require a PCO to be made.’ (at [53]–[54])

[1.24]

‘... in *Oshlack v Richmond River Council* [1998] HCA 11, (1998) 193 CLR 72, a majority of three to two in the High Court of Australia restored the refusal of a judge at first instance to order costs in favour of a council who were the successful respondents to a challenge to a planning consent. The

appellant had been concerned about the habitat of the endangered koala, and complained about the absence of any fauna impact statement before the consent was granted. The judge considered that there were “sufficient special circumstances to justify a departure from the ordinary rule as to costs”. These were to be found in the following considerations. (i) The appellant had nothing to gain from the litigation “other than the worthy motive of seeking to uphold environmental law and the preservation of endangered fauna”. (ii) A significant number of members of the public shared the appellant’s stance, so that in that sense there was a public interest in the outcome of the litigation. (iii) The challenge had raised and resolved significant issues as to the interpretation and future administration of statutory provisions relating to the protection of endangered fauna and the present and future administration of the development consent in question, which had implications for the council, the developer and the public.’ (at [59])

[1.25]

‘In the course of their judgment they showed (at 85 (para 33)) how in England the *First Report of the Judicature Commissioners* (1868–1869) vol 25, p 15, had compared the “full power over the costs” in the Court of Chancery, the Court of Admiralty, and the Courts of Probate and Divorce with the “absence of this power” in the courts of common law, which “often occasioned injustice”. For Chancery practice they cited the judgment of Fry LJ, giving the judgment of this court in *Andrews v Barnes* (1888) 39 Ch D 133 at 138, [1886–90] All ER Rep 758 at 760:

“The jurisdiction of the Lord Chancellor in costs was essentially different from that at common law. ‘The giving of costs in equity,’ said Lord Hardwicke LC in *Jones v Coxeter* ((1742) 2 Atk 400) ‘is entirely discretionary and is not at all conformable to the rule at law’. ‘Courts of Equity’, said the same great Judge in another case, ‘have in all cases done it ... from conscience and *arbitrio boni viri*, as to the satisfaction on one side or other on account of vexation.’ *Corporation of Burford v Lenthall* ((1743) 2 Atk 551).” ’ (at [62])

Protective costs orders: governing principles and cost-capping

[1.26]

‘Since the [Civil Procedure Rules] came into force in this country in 1999 the court’s jurisdiction as to costs has been governed by s 51 of the 1981 Act, which provides:

“(1) Subject to the provisions of this or any other enactment and to rules of court, the costs of and incidental to all proceedings in—(a) the civil division of the Court of Appeal; (b) the High Court; and (c) the county court, shall be in the discretion of the court.

(2) Without prejudice to any general power to make rules of court, such rules may make provision for regulating matters relating to the costs of those proceedings ...

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid ...” ’ (at [64])

[1.27]

‘[Of] the rules contained in CPR Pts 43–48 and the Costs Practice Direction CPR 44.3 is of particular importance:

“44.3(1) The court has discretion as to—(a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.

(2) If the court decides to make an order about costs—(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order ...

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances ...” ’ (at [64])

[1.28]

‘In *King v Telegraph Group Ltd* [[2004] EWCA Civ 613, [2004] All ER (D) 242 (May)] at [82]–[83] this court called in aid a combination of CPR 3.1(2)(m) and CPR 1.1 when it identified the source of its power to make cost-capping orders at an early stage of civil proceedings. A relatively impecunious claimant in a libel action had sued the defendant newspaper group with the benefit of a conditional fee agreement (CFA) ... Brooke LJ set out the court’s solution (with which Jonathan Parker and Maurice Kay LJJs agreed):

“[101] In my judgment the only way to square the circle is to say that when making any costs capping order the court should prescribe a total amount of recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability. It cannot be just to submit defendants in these cases, where their right to freedom of expression is at stake, to a costs regime where the costs they will have to pay if they lose are neither reasonable nor proportionate and they have no reasonable prospect of recovering their reasonable and proportionate costs if they win.” ’ (at [67])

[1.29]

‘We are satisfied that there are features of public law litigation which distinguish it from private law civil and family litigation. The House of Lords identified one important difference in *R v Secretary of State for the Home Dept, ex p Salem* [1999] 2 All ER 42, [1999] 1 AC 450 when Lord Slynn of Hadley acknowledged that the House possessed discretion to hear an appeal concerned with an issue involving a public authority as to a question of public law even when the parties to the appeal had ended the ‘lis’ between them (see [1999] 2 All ER 42 at 47, [1999] 1 AC 450 at 456–457). He said that there must be a good reason in the public interest for doing so, and cited, as an example, a case—

“[where] a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.” ’ (at [69])

[1.30]

‘The important difference here is that there is a public interest in the elucidation of public law by the higher courts in addition to the interests of the individual parties.’ (at [70])

[1.31]

‘Dyson J emphasised that the guidelines related to public interest challenges, which he defined (see [1998] 2 All ER 755 at 762, [1999] 1 WLR 347 at 353). We believe that this definition can usefully be incorporated into the guidelines themselves. Dyson J said that the jurisdiction to make a PCO should be exercised only in the most exceptional circumstances. We agree with this statement, but of itself it does not assist in identifying those circumstances.’ (at [72])

[1.32]

‘We would therefore restate the governing principles in these terms: (1) A PCO may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO. (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.’ (at [74])

[1.33]

‘A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge. In the present judgment we have noted: (i) a case where the claimants’ lawyers were acting pro bono, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (the *Refugee Legal Centre* case); (ii) a case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £25,000) their maximum liability for costs if they lost (*R (on the application of Campaign for Nuclear Disarmament) v Prime Minister* [[2002] EWHC 2777 (Admin), [2002] All ER (D) 245 (Dec)]); (iii) a case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (*Ex p CPAG*); and (iv) the present case where the claimants are bringing the proceedings with the benefit of a CFA, which is otherwise identical to (iii).’ (at [75])

[1.34]

‘There is of course room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question

may arise. It is likely that a cost-capping order for the claimants' costs will be required in all cases other than (i) above, and the principles underlying the court's judgment in *King v Telegraph Group Ltd* [[2004] EWCA Civ 613, [2004] All ER (D) 242 (May)] at [101]–[102] will always be applicable. We would re-phrase that guidance in these terms in the present context:

(i) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability.

(ii) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.

(iii) The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made.' (at [76])

Corner House and the ECGD

[1.35]

'The Export Credits Guarantee Department (ECGD) of the Department of Trade and Industry (DTI) helps to provide finance or security to United Kingdom exporters in the field of international trade. Its operation and powers are governed by the Export and Investment Guarantees Act 1991. It currently supports trade worth around £3bn per annum. Exporters favoured by ECGD backing include Rolls-Royce, Airbus and British Aerospace. One of ECGD's published aims is to help to eradicate or minimise incidents of corruption and bribery in overseas trade.' (at [83])

[1.36]

'There were two non-governmental organisations (NGOs) who took a particular interest in issues concerned with bribery and corruption in connection with the award of major contracts in the international market. One of these was called "Transparency International (UK)" (TI). The other was "Corner House Research" (Corner House).' (at [90])

[1.37]

'Corner House was incorporated a few years ago as a non-profit making-company limited by guarantee. It has a particular interest and expertise in examining the incidence of bribery and corruption in international trade. In this context it has had a long-standing interest in the role of export credit agencies.' (at [91])

[1.38]

‘In June 2003 it published a 79-page booklet by Dr Susan Hawley entitled *Turning a Blind Eye: Corruption and the UK Export Credits Guarantee Department*. This was an expanded version of a report that was published two years earlier. Corner House described itself in the 2003 booklet as—

“a UK-based advocacy, research and solidarity group that aims to support the sustainable use of resources and the growth of a vibrant, democratic, equitable and non-discriminatory civil society in which communities have control over the resources and decisions that affect their lives and means of livelihood, as well as the power to define themselves rather than be defined solely by others.”

... ECGD [promised a] detailed response to the criticisms in the report ... In her witness statement Dr Hawley described how Corner House asked ECGD on several occasions between June and November 2003 when its detailed response would be forthcoming ... On 13 November 2003 ECGD’s external affairs manager told Dr Hawley that ECGD was holding a meeting the following week to discuss the changes it was proposing to make to its application form and procedures. He said that he would reflect the outcome of this meeting in the draft response, which he would put up for approval shortly after that meeting.’ (at [92]–[99])

[1.39]

‘No such response ever saw the light of day. The next thing that happened was that, without any prior consultation with anyone, on 4 March 2004 ECGD sent a letter to its customers announcing new and improved anti-bribery and corruption procedures. These were to come into effect on 1 May. It said that these new measures were introduced to reflect lessons it had learned, and to ensure that it continued to play its part in the government’s drive to root out wrongdoing in international business transactions.’ (at [100])

[1.40]

‘Matters then came to a head, so far as Corner House were concerned, in the third week of October. On 17 and 18 October 2004 the *Financial Times* published articles by its political correspondent headed “UK ministers back down on bribery controls” and “Ministers ‘massage’ anti-bribery export credit guidelines after objections”. The first of these articles revealed that the new rules had run into sustained opposition from British exporters, and that an action group formed by several business bodies had been locked in talks with ECGD since May. The government was understood to have agreed to virtually all their demands.’ (at [108])

[1.41]

‘Corner House was now extremely concerned, because it appeared that ECGD was conducting a detailed and extensive consultation process with corporate customers, but was not prepared to hear the view of NGOs ... On 18 November representatives of Corner House attended a meeting at ECGD’s offices at which ECGD officials told them that the new procedures would not be suspended pending detailed consultation with NGOs. On the

same day the minister wrote a brief letter to Dr Hawley expressing the hope that the meeting had helped to reassure her that ECGD's procedures, compared with those of its leading counterpart export credit agencies, remained among the most effective in the world.' (at [109]–[114])

The issues between the parties

[1.42]

'On 19 November Corner House's solicitors wrote a letter before action to ECGD ... The main thrust of its complaint, which it carried forward into the judicial review proceedings themselves, was that the consultation between March and November 2004 had been one-sided, and that the new procedures and forms had effected fundamental changes to ECGD's anti-corruption requirements. All the changes had been made in one direction, and they weakened anti-bribery and anti-corruption protection.' (at [114]–[115])

[1.43]

'Corner House contended that where the Secretary of State was determining her policy as to standard terms and conditions, and where ECGD had published its policy for consultation on major issues (such as the weakening of the procedures it had recently introduced for combating bribery and corruption in connection with the contracts it supported), both public law fairness and ECGD's own policy required consultation with appropriate stakeholders. Given that ECGD's customers would have an interest in minimising their obligations and duties, ECGD would not receive a balanced or complete presentation of the arguments when determining how to perform its statutory duties unless it was willing to consult organisations like Corner House which were in practice the only bodies able to make representations to ECGD on the other side of the argument and to challenge the views of ECGD's customers.' (at [130])

[1.44]

'ECGD's response to this complaint was to the effect that public law imposes no general duty to consult—it cited Craig *Administrative Law* (5th edn, 2003) pp 381–383 and *English Public Law* (ed Feldman) (2004) pp 790–791 (para 15.28) for this proposition—and that it considered that the revisions it had made were neither fundamental nor major.' (at [132])

[1.45]

'Davis J said ([2004] EWHC 3011 (Admin) at [41]) that on the relatively limited material actually drawn to his attention he would have formed the view that an arguable case for permission to proceed had been shown. He would not have formed the view that something likely to lead to a fundamental change in the way in which ECGD operated was involved here ... Nor would he have taken the view that there was here a major change to ECGD's existing policies and practices ... On the other hand the issues were of some importance at least, and arguably gave rise to an obligation, pursuant to ECGD's published policy, to take advice (if that was the right word) from Corner House given that advice was being taken from the CBI and its customers.' (at [133])

[1.46]

‘He then turned to consider Dyson J’s four criteria in *R v Lord Chancellor, ex p Child Poverty Action Group* [1998] 2 All ER 755, [1999] 1 WLR 347. His conclusion on the third, on which there was no issue on the appeal (so that we do not have to set out the evidence), was that Corner House’s financial resources were very limited and the department had massive resources available to it ... On the other three issues his conclusions were that: (i) the case was not of sufficient general public importance to satisfy the first test; (ii) he did not feel himself to be in a position to say that Lord Lester’s arguments were very strongly arguable, or ones that were very likely to succeed; such consideration could not therefore make up for the deficiency in the general public importance criterion so as to enable him to say that it was in the public interest that he should make a PCO; and (iii) although Corner House asserted that the proceedings would be discontinued if a PCO was not made, its lawyers might well continue to act if the case was indeed as important and as strong as it contended, and it was also appropriate to consider whether or not there might realistically be a pro bono alternative.’ (at [134])

[1.47]

‘On the final issue he also suggested that it somewhat told against the “equality of arms” approach if, unlike the Refugee Legal Centre, Corner House would be asking for costs if it won while seeking a protection against an adverse costs order if it lost.’ (at [135])

*The decision on appeal***[1.48]**

‘We had the opportunity of hearing rather fuller argument than the judge, and this enabled us to form a view of the case for making a PCO based on a rather fuller study of the available documents.’ (at [136])

[1.49]

‘Procedural issues, however, are often of greater importance than issues of substantial law. It is in our judgment a matter of general public importance if a division of a department of state publishes and adopts an open consultation policy of general application and then reverts to a timeworn practice of privileged access, particularly on an issue as obviously sensitive as measures to combat bribery and corruption in connection with the attainment of major contracts abroad.’ (at [140])

[1.50]

‘What Corner House was mainly worried about was whether it would have to pay the Secretary of State’s costs (and possibly the costs of an interested party, too) if it lost. Whether its lawyers might be willing to act pro bono or whether they had great confidence in the strength of their clients’ case were matters which did not eliminate that risk. Mr Nicholas Hildyard, the director of Corner House responsible for its financial management, told the court that the company possessed slightly more than £8,000 in unrestricted funds, which was already fully committed, and that all the alternative

funding sources which it had approached were unable to help. He gave unequivocal evidence to the effect that without the benefit of a PCO the company would have no option but to withdraw the claim, and the judge should have made findings to that effect on the evidence before him.’ (at [141])

[1.51]

‘[W]e considered that Corner House had a “real prospect of success” in the sense that that phrase is used in CPR Pts 24 and 52 [and] considered that the public interest required that these issues should be litigated, and since Corner House had no private interest in the outcome of the case ... we considered in the exercise of our discretion that it was appropriate to permit Corner House to proceed with the benefit of a PCO, and that this was one of those exceptional cases in which such an order should be made. Corner House had a real prospect of showing that they had been wronged. Whether ECGD’s procedural principles promised them consultation or dialogue, they had received neither. In 2003 they had been promised a substantive response to their report, and they never received it. In 2004 they were offered a meeting with the minister, and the offer ran into the sand. ECGD told them (and TI) that it regarded them as their primary NGO partners on the topic of bribery and corruption, yet what occurred in the spring, summer and early autumn of 2004 was the antithesis of partnership. And all through 2004 ECGD was affording privileged access to the representatives of commerce and banking which it wholly denied to Corner House, despite its acknowledged expertise on the topic and in the face of ECGD’s own consultation policy.’ (at [143]–[144])

[1.52]

‘In *R v Somerset CC, ex p Dixon* (1998) 75 P & CR 175 at 183 Sedley J said that – “[p]ublic law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power ...” ’ (at [145])

[1.53]

‘In the present case Corner House asserted that it had been wronged, and if all the criteria for the grant of a PCO were otherwise met, we were satisfied that it was necessary in the interests of justice that it should be permitted to continue with the proceedings with the protection of a PCO. If we had not taken that course, the issues of public importance that arose in the case would have been stifled at the outset, and the courts would have been powerless to grant this small company the relief that it sought.’ (at [145])

[1.54]

‘Our order as drawn provided that:

‘... 4. The court directs that the defendant is not permitted to recover its costs of the judicial review proceedings from the claimant.

5. The claimant’s costs are to be capped applying the decision of the Court of Appeal in *King v Telegraph Group Ltd* [2004] EWCA Civ 613 at [101]–[102], [2004] All ER (D) 242 (May)] at [101]–[102].

6. The claimant to apply to the senior costs judge to set the level of the court's cap.”

Protective costs orders for defendants

[1.55] Shortly after the *Corner House* case, Collins J in *R (on the application of the Ministry of Defence) v Wiltshire and Swindon Coroner* [2005] EWHC 889 (Admin), [2005] 4 All ER 40 held that a PCO could in principle be made for the benefit of a defendant, not merely an applicant. Where the defendant is a public authority, there would be no need for this, unless an individual has a public law role and is not supported by a body with suitable funds. Proceedings in public law for an injunction or a declaration brought by an authority under the Local Government Act 1972, s 222, or by the Attorney-General in a relator action, might also exemplify this, not judicial review merely.

[1.56] In this case against the Wiltshire Coroner, the Ministry sought a court order in judicial review to make the coroner hand over tapes of an inquest hearing which raised difficult legal issues relating to the crime of manslaughter (the Porton Down inquiry). The coroner as defendant feared that the litigation would make undesirable inroads into the finances of Wiltshire County Council, whose duty it would be to indemnify him under the Coroners Act 1988, s 27A; and he asked for a PCO.

[1.57] Collins J said: ‘I see no reason in principle why a PCO should not in an appropriate case extend to protect the position of a defendant.’ Was this an appropriate case? ‘It is clear that someone is going to have to deal with the arguments against the Ministry.’ And ‘If the coroner does not appear and take an active role someone is going to have to do so ...’ Yet ‘it may be that there is a more general concern ... than just for the County of Wiltshire and ... in some form or other, central funds should bear the burden’. Thus, ‘I do not believe that ... the coroner’s situation can be said ... to make it appropriate to grant a PCO.’ There are also no special considerations in an appropriate case if a PCO is not sought until the stage of Court of Appeal proceedings: *R (on the application of Goodson) v Bedford and Luton Coroner* [2005] EWCA Civ 1172, [2005] All ER (D) 122 (Oct).

Public law damages and human rights

[1.58] Damages which may be sought in proceedings founded purely on a public law cause of action are distinct from damages in a private law cause of action in tort, contract or quasi-contract at common law (derived from the medieval ‘forms of action’) or in equity, and are a novelty, derived from the Human Rights Act 1998 and the European Convention for the Protection of Human Rights and Freedoms 1950. Last year, in *A v Head Teacher and Governors of Lord Grey School* [2004] EWCA Civ 382, [2004] 4 All ER 628 (see All ER Rev 2004 at [1.65]–[1.79]), an action for damages on this basis succeeded against a local authority school.

[1.59] In *R (on the application of Greenfield) v Secretary of State for the Home Dept* [2005] UKHL 14, [2005] 2 All ER 240 (see also [28.5] below), another such action for damages was pursued, but in the context of judicial review. The defendant conceded that there had been a violation of the claimant's human rights, to be redressed by the grant of appropriate declarations in agreed terms. But a claim for damages in addition was not conceded. By this point the dispute had reached the House of Lords, which needed to deal with the one outstanding question of damages.

[1.60] The claimant was a prisoner in HM Prison Doncaster (a private prison), who was charged before a 'Deputy Controller' with a drugs offence. This was found proved and he was ordered to serve an additional 21 days' imprisonment. But 'the structural independence and impartiality required for such adjudications' had been lacking. This was the infringement of art 6 of the 1950 Convention, conceded by the defendant. But was the claimant also entitled to damages? No, said Lord Bingham – 'the pursuit of damages should rarely, if ever, be an end in itself in an art 6 case'. On the facts of this case 'the finding in the appellant's favour affords just satisfaction, and ... applying Strasbourg principles, the award of damages is not necessary'.

Compatibility of statutes and proportionality of decisions

[1.61] The same fundamental questions of human rights were again litigated in *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 All ER 1 in the House of Lords (see also [15.35] [15.40] below). This was an unsuccessful appeal from the Court of Appeal's decision two years previously, discussed in All ER Rev 2003 at [1.31]–[1.43]. Do teachers' and parents' human rights extend to a right of administering physical punishment in school (ie beating), in furtherance of freedom of thought, conscience and religion, so as to 'manifest' their beliefs in practice? If they do, it follows that s 548(1) of the Education Act 1996, which bans corporal punishment in schools, is ultra vires and should be declared 'incompatible'.

[1.62] There are two aspects of human rights which are relevant here under the Convention of 1950. The right to 'manifest one's religion or beliefs' is laid down in art 9. The 'right to education' in art 2 of the First Protocol to the Convention includes 'the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'.

[1.63] But, said Lord Nicholls, art 9 qualifies the right by 'such limitations as are prescribed by law and are necessary in a democratic society in the interests of [inter alia] the protection of the rights and freedoms of others'. This qualification justifies, and is fulfilled by, s 548(1): 'Parliament was entitled to [enact s 548(1)] because the issue is one of broad social policy', the intention being: 'to protect children

against the distress, pain and other harmful effects this infliction of physical violence may cause. 'For the same reasons there has been no violation of the claimant parents' rights under art 2 of the First Protocol.' A fortiori this reasoning ought to apply to forced marriages and the like.

[1.64] In *R (on the application of Morris) v Westminster City Council* [2004] EWHC 2191 (Admin), [2005] 1 All ER 351 it was claimed that primary legislation, namely the Housing Act 1996, s 185(4), was incompatible with the claimant's right, under art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 to respect for family life (under art 8) without discrimination (see also [17.43]–[17.54] below). The claimant had been given leave to enter the United Kingdom from Mauritius with her young dependent daughter. She then proved herself to be a British citizen; but this was not the case for the daughter who was disregarded when the claimant tried to prove eligibility for housing assistance on the basis of priority need. Eligibility was denied under s 185(4). Keith J held that this showed s 185(4) to be incompatible with the claimant's human rights under art 14; and he accordingly made a declaration of incompatibility.

[1.65] In *Huang v Secretary of State for the Home Dept* [2005] EWCA Civ 105, [2005] 3 All ER 435 an appeal to the Court of Appeal from the Immigration Appeal Tribunal raised the question whether proportionality should be a governing factor in deciding whether a decision of the Home Secretary to remove an immigrant ought to be upheld. The adjudicator in this particular case had decided that the decision to remove should (in effect) be quashed because, although the Immigration Rules justified refusal, there were special circumstances which appeared to engage art 8 of the European Convention on Human Rights – ie respect for private and family life – and make it disproportionate to insist that the Immigration Rules should prevail. Was this an unwarranted intrusion into the area of governmental policy? The Court of Appeal restored the decision of the adjudicator which the tribunal had overturned, on the basis that the special family circumstances made it an exceptional case and it would be disproportionate not to uphold the human rights challenge. Government policy was not being judged, merely the proportionality of weighing it in the balance against human rights in the particular case. It is 'the court's task to decide' (per Laws LJ).

Jurisdiction of the Law Society

[1.66] In *R (on the application of the Law Society) v Master of the Rolls* [2005] EWHC 146 (Admin), [2005] 2 All ER 640 (see also [23.32] below), a decision of Lord Phillips MR was under challenge. Can a foreign lawyer registered as such by the Law Society under the Courts and Legal Services Act 1990, Sch 14, be subjected to conditions which are imposed on the registration subsequently? Lord Phillips MR's decision that, on a point of construction, Sch 14 permits this only on the initial entry in the register,

not subsequently, was upheld by the Queen's Bench Divisional Court. The alternative interpretation would have a 'draconian' effect: 'I entirely agree' (per Thomas LJ).

Arbitration

SALIM A H MOOLLAN

Ancien élève de l'École Polytechnique, Diplômé de l'Institut d'Études Politiques de Paris, MA (Cantab), Barrister, Essex Court Chambers

Overview

[2.1] The most important case of 2005 is without doubt the House of Lords' opinion in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2005] 3 All ER 789, reversing the Court of Appeal's decision ([2003] EWCA Civ 1159, [2004] 1 All ER (Comm) 97), which was reviewed in All ER Rev 2004 at [2.42]–[2.44] (and see also [5.22] below). Whilst the case deals with issues of obvious practical importance to practitioners (relating to the court's powers to issue an award in the currency of their choice under s 48 of the Arbitration Act 1996 (hereinafter 'the Act') and to award interest under s 49 of the Act), it is most notable for the House of Lords' strong reaffirmation of non-interventionism in international arbitration (a principle enshrined, inter alia, in s 1(c) of the Act) (see [2.10]–[2.19] below).

[2.2] The House of Lords' decision should be contrasted with that of the Commercial Court in *Covington Marine Corp v Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm), [2005] All ER (D) 245 (Dec), where Langley J took the rare step of reversing the decision of an arbitral tribunal sitting in London without remitting the matter to the arbitrators (see [2.20]–[2.29] below). In *Demco Investments and Commercial SA v SE Banken Forsakring Holding Aktiebolag* [2005] EWHC 1398 (Comm), [2005] All ER (D) 109 (Oct) Cooke J has for his part rejected an attempt to challenge the findings of fact in an award made on the ground that there was no evidence to support the said findings of fact, thereby re-emphasising this important limit to s 69 of the Act. *Demco* has been followed by Jackson J in *Surefire Systems Ltd v Guardian ECL Ltd* [2005] EWHC 1860 (TCC) (see [2.30]–[2.32] below).

[2.3] This is also the year where the rising wave of investment treaty arbitration has started reaching the Commercial Court. *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2005] 2 All ER (Comm) 689 represents the first attempt by the losing party to an ad hoc investment arbitration with its seat in London to challenge the award under the provisions of the Act (in this case ss 67 and 68). The investor argued as a preliminary issue that such a challenge was barred as a matter of (in effect) English constitutional law. Both Aikens J and the Court of Appeal disagreed. The case is now following its course

in the English courts and the substantive challenge to the jurisdiction was heard in late 2005 (see [2.33]–[2.41] below).

[2.4] *AIG Capital Partners Inc v Republic of Kazakhstan (National Bank of Kazakhstan intervening)* [2005] EWHC 2239 (Comm), [2006] 1 All ER 284, [2006] 1 All ER (Comm) 1 is for its part the first reported decision on the enforcement of an ICSID award in England, and raises issues of immunity of central banks under the State Immunity Act 1978 in that context. Aikens J held in favour of the defendant state, and gave permission to appeal (see [2.42]–[2.48] below). The appeal should be heard in early 2006.

[2.5] The novel and problematic distinction drawn by the Court of Appeal in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd* [2004] EWCA Civ 1598, [2005] 1 All ER (Comm) 715 (reviewed All ER Rev 2004 at [2.15]–[2.23]) between ‘being a party’ to an arbitration agreement and ‘being bound’ by the said agreement has now been considered at first instance on two occasions, by Moore-Bick J in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd, The Hari Bhumi (No 2)* [2005] EWHC 455 (Comm), [2005] All ER (D) 351 (Mar) and by Colman J in *West Tankers Inc v Ras Riunione Adriatica Di Sicurtà, The Front Comor* [2005] EWHC 454 (Comm), [2005] 2 All ER (Comm) 240. These two decisions appear to have deprived the aforesaid distinction of any practical effect, thereby reaffirming the orthodox (and it is submitted, correct) position of the Court of Appeal in *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH, The Jay Bola* [1997] 2 Lloyd’s Rep 279 (see [2.49]–[2.55] below).

[2.6] Two cases in the Commercial Court have considered the enforcement of awards under the New York Convention, as re-enacted into English Law in Pt III (ss 100–104) of the Act. The first, *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corpn* [2005] EWHC 726 (Comm), [2005] All ER (D) 385 (Apr), contains a helpful summary of the legal principles applicable to the exercise of the court’s discretion under s 103(5) of the Act to adjourn its decision on recognition or enforcement of the award and/or to require the provision of security where an application for the setting aside or suspension of the award has been made to a competent authority of the country in which or under the law of which the award was made. The second, *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2005] EWHC 9 (Comm), [2005] 1 All ER (Comm) 515, came before the Commercial Court on two occasions, first before Mr Nigel Teare QC sitting as a deputy judge in early 2005 and then before Gloster J (*Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2005] EWHC 2437 (Comm), [2005] All ER (D) 140 (Nov)). It is submitted that these decisions’ approach of principle to the question of enforcement of an award under the New York Convention is not without difficulties. (see [2.56]–[2.67] below).

[2.7] *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), [2005] All ER (D) 271 (Nov) raises issues of arbitrator bias which are becoming an increasing feature of international commercial arbitration, and contains a comprehensive review of the authorities in this field. It also refers (apparently for the first time before the English courts) to the IBA Guidelines on conflicts of interest in international arbitration (see [2.68]–[2.70] below).

[2.8] The construction of s 44(3) of the Act (power of the court to order interim measures in urgent cases) in *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] EWHC 479 (Comm), [2004] 1 All ER (Comm) 753 (a first instance case reviewed in All ER Rev 2004 at [2.63]–[2.64]) has been disapproved by the Court of Appeal in *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 4 All ER 52, [2005] 2 All ER (Comm) 203 (see [2.71]–[2.75] below).

[2.9] Finally, *Law Debenture Trust Corpn plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch), [2005] 2 All ER (Comm) 476 raises issues as to the interaction between ss 32, 67 and 72 of the Act in the context of applications to the court for determination that a tribunal lacks or lacked substantive jurisdiction (see [2.76]–[2.79] below).

Lesotho Highlands in the House of Lords: the ethos of the Arbitration Act 1996

[2.10] The facts of the case are extensively set out in the 2003 Review (see All ER Rev 2003 at [2.4] [2.10], reviewing the first instance decision of Morison J ([2002] EWHC 2435 (Comm), [2003] 1 All ER (Comm) 22) and are not repeated here. The Court of Appeal's decision ([2003] EWCA Civ 1159, [2004] 1 All ER (Comm) 97) was reviewed in All ER Rev 2004 at [2.42]–[2.44].

[2.11] The decisions of Morison J and of the Court of Appeal were reversed by the House of Lords ([2005] UKHL 43, [2005] 3 All ER 789). The issues raised by the appeal were relatively narrow, being in essence:

- (a) the proper construction of s 68(2)(b) of the Act and the scope of the 'excess of powers' head of serious irregularity contained therein;
- (b) the proper construction and scope of s 48 of the Act, and in particular of s 48(4) (power of the tribunal to order the payment of a sum of money 'in any currency') and 48(2) (agreement to the contrary excluding the power under s 48(4)) thereof;
- (c) the proper construction and scope of s 49 of the Act, and in particular of s 49(3) (power of the tribunal to award 'simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case') and s 49(2) (agreement to the contrary excluding the power under s 49(3)) thereof.

[2.12] It will be recalled that the arbitration was conducted under the rules of the ICC, with a London seat, and concerned a contract

containing an express choice of Lesotho law. The tribunal had purported to use the powers which they decided were available to them under ss 48(4) and 49(3) of the Act to render their award in such currencies as it saw fit, and to award such interest as it considered met the justice of the case. The losing party in the arbitration, Lesotho Highlands Development Authority (LHDC), contended that these wide powers were not in fact available to the tribunal, which should have applied the contractual provisions and/or Lesotho law to the issues of currency and interest, and that the tribunal's purported exercise of powers which were not in fact available to them constituted an 'excess of power' which had caused LHDC 'substantial injustice' within the meaning of s 68(2)(b) of the Act. These contentions won the day at first instance and in the Court of Appeal.

[2.13] The leading speech of Lord Steyn goes further than any prior pronouncement of the House of Lords in its unmitigated support of the autonomy of arbitration (and in particular of international arbitration) in England, and is clearly meant to send a strong signal to the international community in this respect. That message is, however, undeniably dampened by the unwillingness of Lord Steyn's brethren (Lords Hoffmann, Phillips, Scott and Rodger) to accept Lord Steyn's liberal approach to its fullest extent. The Lords' decision is accordingly rendered somewhat complex, and a careful analysis thereof is required if the true ratio of the decision is to be discerned.

[2.14] Lord Steyn's speech adopts what could be described as a 'teleological approach' to the construction of the Act, and of the particular provisions under consideration, based on what his Lordship refers to as 'the ethos of the 1996 Act', and on the expectations of the international community. This leads his Lordship to reach the following conclusions:

- (a) The arbitrators were correct to give a wide meaning to s 48(4) of the Act, and the power of arbitrators to order the payment of a sum of money in any currency is without limit. This interpretation gives s 48(4) 'a businesslike meaning which will assist the arbitral process' (see at [22]).
- (b) If, contrary to that view, the arbitrators had erred in law in their interpretation of their powers under s 48(4), such an error does not constitute an excess of power within the meaning of s 68(2)(b) of the Act (see at [23]–[34]).
- (c) LHDC's challenge to the arbitrators' award of interest should be dismissed on the ground that LHDC could not demonstrate any 'substantial injustice' for the purposes of s 68 of the Act. Further, the parties' choice of Lesotho law is incapable in law of constituting an 'agree[ment] otherwise' within the meaning of s 49(2) of the Act (see at [35] and [36]).
- (d) Assuming *arguendo* that the arbitrators awarded interest which they were not entitled to award as a matter of Lesotho law, this might

constitute a mere error of law but not an ‘excess of power’ within the meaning of s 68(2)(b) (see at [37]–[39]).

[2.15] Lord Phillips for his part unreservedly accepted the conclusions of Lord Steyn on the interest point (points (c) and (d) above) (see at [43]) but found himself unable to accept Lord Steyn’s conclusions on points (a) and (b) above. In his Lordship’s opinion:

- (a) With respect to point (a): the arbitrators have erred in law in choosing the wrong rates of exchange when they chose to express their award in European currencies. Section 48(4) of the Act did not ‘have the radical effect of empowering arbitrators to ignore the substantive law in relation to foreign currency obligations’, and does not give them an unfettered discretion with respect to the currency of the award (at [43]–[50]).

The difference of approach between Lord Phillips and Lord Steyn on this point is stark and should be emphasised: while Lord Phillips does not directly disapprove of Lord Steyn’s ‘teleological’ construction of s 48(4), his approach is one of literal construction based upon the wording of the section and on existing case law.

- (b) With respect to point (b): By purporting to make use of powers under s 48(4) which were not in fact available to them, the arbitrators have exceeded their powers within the meaning of s 68(2)(b). This constitutes a ‘serious irregularity’ (see at [51]) which caused ‘substantial injustice’ to LHDC (see at [52] and [53]).

[2.16] Lords Hoffmann, Scott and Rodger for their part agreed with Lord Steyn, save for point (a) above, on which their Lordships agreed with Lord Phillips.

[2.17] The result is accordingly a complex one, and it should be observed:

- (a) That the majority of the Appellate Committee does not appear to have accepted one of the more radical proposals of Lord Steyn to ignore pre-1996 case law when construing the 1996 Act.
- (b) That it is difficult to consider that Lord Steyn’s general observations about the philosophy of the Act are part of the *ratio decidendi* of the case, given that the principal conclusion which he would draw therefrom (the arbitrators’ unfettered power to make their award in such currencies as they see fit under s 48 of the Act) is rejected by all his brethren.

[2.18] The said observations are nonetheless of very wide importance, and Lord Steyn’s exhortations for a proper respect of arbitral awards and for judicial restraint in the field of arbitration is bound to feature largely in the development of English arbitration law in the years to come.

[2.19] From a practical point of view:

- (a) The Lords’ decision appears to have deprived the head of ‘serious irregularity’ in s 68(2)(b) of the Act of any practical significance.

This is because it is difficult to fault Lord Phillips's conclusion that if (as found by the majority of the Appellate Committee) the arbitrators expressly purported to exercise powers which they did not in fact enjoy, such a wrongful exercise must be the archetypal example of 'the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction)' within the meaning of s 68(2)(b). Yet, the majority of the Appellate Committee reached the opposite conclusion, influenced no doubt by Lord Steyn's appeals in favour non-interventionism.

- (b) As for the powers of arbitral tribunals sitting in England with respect to the currency of their award, the Lords' decision confirms that these powers are not unfettered but are subject to the relevant English substantive rules (these are broadly summarised by Lord Phillips at [47]).
- (c) As for the powers of arbitral tribunals sitting in England to award interest, the House of Lords' decision would appear to give all such arbitral tribunals the wide powers conferred by s 49(3) of the Act, and this irrespective of the provisions of the substantive law applicable to the particular contract. It is submitted that this aspect of the decision is not free from doubt, especially in the light of s 4 of the Act (a provision not referred to in the House of Lords' decision).

Section 69 and non-interventionism

[2.20] Section 69 of the Act (which allows an appeal from an award 'on a point of law') played no part in the House of Lords' decision in *Lesotho Highlands*. This is for the two independent reasons that:

(a) this avenue of recourse had been validly excluded by art 28.6 of the Rules of the International Chamber of Commerce which provides, inter alia, that: 'By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made' (see Lord Steyn at [3]); and

(b) the relevant contract was governed by a law other than English law. (See s 82(1) of the Act, which defines 'a question of law' for a court in England and Wales as 'a question of the law of England and Wales'.)

[2.21] The retention of a right of appeal from arbitral awards was one of the most controversial features of the Act. This aspect of English arbitration had long been the object of criticism from foreign commentators, and the Departmental Advisory Committee on Arbitration Law (DAC) received a number of responses calling for the abolition of any right of appeal on the substantive issues in the arbitration: see paras 284–285 of the DAC Report. The solution adopted was to retain the right of appeal, but to make s 69 non-mandatory (see the

words ‘Unless otherwise agreed by the parties’ introducing s 69(1)). This in effect leaves it to the parties to opt out of the appeal regime. (See also [5.21] below.)

[2.22] The decision in *Covington Marine v Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm), [2005] All ER (D) 245 (Dec) has refuelled the argument around s 69, and led at least one leading commentator and practitioner (Mr V V Veeder QC, speaking at the British Institute of International and Comparative Law’s Ninth Annual Review of the Arbitration Act) to advocate the replacement of this opt-out regime for a new opt-in regime, which would ensure that only parties fully aware of and desirous of retaining this idiosyncratic feature of English arbitration would in fact retain it.

[2.23] The case concerned the proper construction of a clause in shipbuilding contracts concluded between four Marshall Islands companies controlled by Greek interests (the buyers) and a Chinese shipyard. The contract was governed by English law and apparently contained an arbitration clause providing for London arbitration. (The judgment of Langley J does not refer to or cite the arbitration agreement.)

[2.24] The appellant buyers (Covington) appealed against the decision of the arbitrators (Messrs Anthony Diamond QC, Anthony Hallgarten QC and Philip Yang) that the four shipbuilding contracts between Covington and the respondent shipyard (Xiamen) had been automatically rescinded under the provisions of art 21(b) of the contracts because the conditions set out in that clause had not been met. The contracts were for the building of four bulk carriers. Article 21 provided that the contract would become effective from the date of its execution by the parties provided that certain conditions were satisfied. Article 21(b) provided for the contract to be automatically rescinded if the parties did not agree on the supplier of the main engine within a fixed period, and if there was failure by one side or the other to comply with the specified obligations, including (in art 21(b)(ii)) receipt by Covington of a letter of guarantee in respect of Xiamen’s obligation under art 10 to refund sums paid by Covington prior to delivery of the vessel in the event that Covington became entitled to rescind the contract. Covington alleged that Xiamen had repudiated the contracts after Xiamen signed contracts to build essentially the same vessels for another buyer. Covington submitted that: (1) the requisite agreement on the engine supplier had been achieved by an exchange of letters between the parties’ brokers; (2) Xiamen was not entitled to rely on the absence of agreement as to the engine supplier when it had already decided for commercial reasons not to perform the contracts; (3) it had been open to Covington to extend time to Xiamen for the provision of the refund guarantees under art 21(b)(ii).

[2.25] Langley J held that the question whether or not the letters constituted a binding agreement was one of law or mixed fact and law, referring in this context to *Finelvet AG v Vinava Shipping Co Ltd*, *The*

Chrysalis [1983] 2 All ER 658 and *André et Cie v Cook Industries Inc* [1986] 2 Lloyd's Rep 200. In *The Chrysalis* Mustill J had held that while intervention by the court in these circumstances could be legitimate, the court should only intervene either when 'the correct application of the law to the facts found would lead inevitably to one answer whereas the arbitrator has arrived at another' (a question which Mustill J referred to as arising at 'the second stage') or when 'the arbitrator's decision is out of conformity with the only correct answer or (as the case may be) lies outside the range of correct answers' (a question which Mustill J referred to as arising at 'the third stage'). In *André et Cie v Cook Industries Inc*, Bingham J held that 'in a case [where the tribunal was a trade tribunal] the court's task is not one of pure construction and [one] should be reluctant to differ from the [tribunal] unless it appeared that [the tribunal]'s construction was fairly plainly untenable'.

[2.26] Both these cases are, of course, cases decided before the passage of the 1996 Act. Langley J held that they nonetheless represented the present law. It is notable in this respect that neither the DAC Report (which evidences the drafters' intent to restrict the right of appeal under s 69) nor the declarations of principle of Lord Steyn in the *Lesotho* case (see above) appear to have been cited to his Lordship.

[2.27] Langley J further held (it would appear: see at [38]) that the facts of this case did not bring into play the restrictive test set out by Bingham J in the *André* case (the present tribunal not being a 'trade tribunal') and that this was a 'second stage' case for the purposes of the test laid down by Mustill J in *The Chrysalis* (at [39]) (meaning therefore that this was a case where 'the correct application of the law to the facts found would lead inevitably to one answer whereas the arbitrator has arrived at another').

[2.28] His Lordship therefore considered anew all the relevant correspondence, reaching conclusions contrary to those of the tribunal, and holding that Xiamen was in repudiatory breach. His Lordship then held that, despite the presumption in favour of remittal contained in s 69(7) of the Act, there was no point in remitting the issue to the arbitrators in the present case, and accordingly varied the awards so as to provide that the contracts were not automatically rescinded under the provisions of art 21(b) and had been repudiated by Xiamen, which was liable in damages to Covington accordingly.

[2.29] It is submitted that – irrespective of the correctness or otherwise of Langley J's ultimate decision on the substance of the dispute – this case is difficult to reconcile with the restrictive approach which the drafters of the Act took to s 69, or with the House of Lords' non-interventionist approach in *Lesotho Highlands*. In particular, it is submitted that courts should be slow in allowing appeals on questions of mixed fact and law, which will almost inevitably lead the court to engage into *some* form of review of the facts as found by the tribunal.

[2.30] That courts should refrain from engaging into such factual review was re-emphasised by Cooke J in *Demco Investments and Commercial SA v SE Banken Forsakring Holding Aktiebolag* [2005] EWHC 1398 (Comm), [2005] All ER (D) 109 (Oct). In that case (the facts of which are irrelevant for present purposes), the applicant (Demco) applied for permission to appeal under s 69 against arbitrators' findings that a company which it had sold to the respondent bank had mis-sold pensions to investors. Demco submitted in particular, relying on *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, that some of the findings made by the tribunal were based on inferences which no reasonable arbitrator could have made.

[2.31] Cooke J held (at [35]–[48]) that the alleged errors of law and the questions raised by Demco were issues arising in relation to the arbitrators' findings of fact. Under s 69(3)(c) the arbitrators' findings of fact could not be challenged as they had to be accepted for the purpose of any application for permission to appeal. Furthermore, having regard:

(a) to the legislative intent behind the form of words used in the Act (as set out in para 286(iii) of the DAC Report);

(b) to pre-1997 case law (*Geogas SA v Trammo Gas Ltd, The Balears* [1993] 1 Lloyd's Rep 215 – his Lordship declined to follow the pre-1996 first instance decision of Millet J in *Capital & Counties plc v Hawa* [1991] 2 EGLR 133 on the basis that the 1996 Act had clarified the position through s 69(3)(c) and the DAC Report; and the post-1996 decisions of Etherton J in *Guardcliffe Properties Ltd v City & St James Property Holdings* [2003] EWHC 215 (Ch), [2003] All ER (D) 53 (Feb) and of his Honour Judge Thornton QC in *Fence Gate Ltd v NEL Construction Ltd* [2001] All ER (D) 214 (Dec), on the basis that the point was not argued before these judges by reference to the opening words of s 69(3)(c) nor to the wording of the DAC Report); and

(c) to the leading textbooks (Mustill and Boyd *Commercial Arbitration* (2nd edn, 2001) *Companion Volume* p 357; F Russell *Arbitration* (22nd edn, 2000) pp 394–395; R Merkin *Arbitration Law* (2004), paras 15.42–15.44 and 21.9–21.11)

it was not open to the court to find that, because there was no evidence to support the findings, there had been an error of law giving rise to an appeal under s 69.

[2.32] The *Demco* case was followed by Jackson J in *Surefire Systems Ltd v Guardian ECL Ltd* [2005] EWHC 1860 (TCC), where his Lordship dismissed an application for leave to appeal under s 69 on the ground that the legislative intent of s 69(3) of the Act was to prevent parties seeking to dress up questions of fact as questions of law, and that the evidence that was admissible on an application for leave to appeal was to be strictly limited.

Rights of recourse in investment treaty arbitration

[2.33] *Republic of Ecuador v Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2005] 2 All ER (Comm) 689 constitutes the first attempt – in England – to challenge an award made pursuant to a bilateral investment treaty (BIT), in this instance the BIT between the United States and Ecuador. The difficult question of a challenge to such an award before the courts of the seat of the arbitration has already been considered in other jurisdictions (see eg *Czech Republic v CME Czech Republic BV* (Svea Court of Appeal, Sweden, decision of 15/05/03); *Canada v SG Myers Inc* (Kelen J, Canadian Federal Court, decision of 13/01/04)); and the Court of Appeal in *Occidental* refers to these decisions (at [55]).

[2.34] It should be emphasised that the decision of the Court of Appeal constitutes but the first tranche of this seminal case, which only deals with a preliminary issue of law raised by the investor (*Occidental*). As explained by Mance LJ (who delivered the unanimous judgment of the court) (at [41]):

‘This case concerns not the scheme of the Arbitration Act 1996, but whether there is a general principle of non-justiciability in English law which precludes the conventional operation of the Act, for reasons of constitutional propriety or because of wider considerations of judicial restraint, having regard to inherent limitations in the judicial role and/or to this country’s national and international interests.’

[2.35] *Occidental*, a Californian corporation, appealed against the decision of Aikens J ([2005] EWHC 774 (Comm), [2005] All ER (D) 06 (May)) that the English courts had jurisdiction to entertain an application by the respondent, the Republic of Ecuador, challenging the jurisdiction of an arbitration tribunal. The arbitration was an ad hoc arbitration under UNCITRAL Rules under the US/Ecuador BIT. London was selected by the arbitrators as the place of arbitration because (in particular) it was perceived as a neutral place (at [2]). The arbitrators made an award in *Occidental*’s favour. Ecuador wished to have the award set aside under s 67 or s 68 of the Act. *Occidental* raised the preliminary objection that Ecuador’s challenge required the English court to interpret provisions of a BIT made between the United States and the Republic of Ecuador, in contravention of the rule of English law making such an issue non-justiciable. Aikens J held that the principle of non-justiciability did not apply and could not prevent the English court from entertaining an application made by a party challenging the jurisdiction of the arbitration tribunal where the parties had agreed that their rights should be determined by domestic law. *Occidental* appealed the decision, arguing that if Ecuador’s challenge was allowed to proceed, the court would be required to enforce or interpret the terms of the BIT contrary to the principle in *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1989] 3 All ER 523 (the *Tin Council* case) or to ‘adjudicate upon

the transactions of foreign sovereign states' contrary to a wider principle of 'judicial restraint or abstention' as stated in *Buttes Gas and Oil Co v Hammer (No 3)* [1981] 3 All ER 616.

[2.36] The Court of Appeal, dismissing the appeal, held that Ecuador's challenge was justiciable before the English court. The House of Lords' decision in *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19, [2002] 3 All ER 209, [2002] 1 All ER (Comm) 843 demonstrated that the principle of non-justiciability was not an absolute rule. Moreover, the *Tin Council* case itself recognised exceptions to the rule. It followed that English courts were not wholly precluded from interpreting or having regard to the provisions of unincorporated treaties; the context was always important. The court was to take into account the special character of a BIT and of the agreement which it was intended to facilitate which were both (a) recognised under English private international law rules and (b) (in the instant case) subject to the Act. The BIT involved a deliberate attempt to ensure for private investors the benefits and protection of consensual arbitration. That was an aim to which national courts should aspire to give effect by reason of internationalist spirit and because it had been agreed between states at an international level. Moreover, there was nothing in the resolution of the issues in the instant case which could make them remotely comparable in difficulty to the issues in the *Buttes Gas* case. Further, the states that were parties to the treaty had deliberately chosen to provide for a mechanism for dispute resolution which invoked consensual arbitration with domestic legal connotations. That factor was one which should make an English court hesitate long about subjecting such arbitration proceedings to special principles of judicial restraint developed in relation to international transactions or treaties lacking any foundation or incorporation in domestic law.

[2.37] On a practical level, the following conclusions can be drawn from this case for investment arbitrations with a London seat:

- (a) With respect to ICSID arbitrations, no challenge is permissible by virtue of s 3(2) of the Arbitration (International Investment Disputes) Act 1966 (which implements the Washington Convention 1965 into domestic English law). This point is expressly confirmed by Mance LJ (at [38]).
- (b) In the *Occidental* case, the Court of Appeal has accepted the applicability of the Arbitration Act 1996, and of the rights of recourse against a challenge available thereunder *on the facts of the case* (in practice, only the rights of recourse under ss 67 and 68 of the Act – which are of mandatory application – should be relevant, as the operation of s 69 will usually be excluded either by contrary agreement or because the applicable law is not English law: see [2.20] above). To reach that conclusion, the Court of Appeal put considerable weight on the particular terms of the applicable BIT which gave the investor the choice of an arbitration 'with domestic

legal connotations’, being the application of UNCITRAL Rules and the clear intention of the High Contracting Parties to submit any arbitration to the New York Convention regime (art VI.6 of the BIT provided that ‘any arbitration [under the BIT] shall be held in a state that is a party to the New York Convention’: see at [47] and [53]–[55]).

[2.38] Over and above these practical considerations, the Court of Appeal’s judgment is of the highest theoretical importance with respect to a number of aspects of investment treaty arbitration, ranging from the very nature of such arbitrations to the issue of the law applicable to the arbitration agreement.

[2.39] As for the nature of investment arbitration, the Court of Appeal rejected Occidental’s argument that Occidental was enforcing rights of the United States under the BIT. In a careful discussion of the public international law case law, Mance LJ unequivocally endorsed (at [20]) the following passage of an article by Zachary Douglas ‘The Hybrid Foundations of Investment Treaty Arbitration’ (2003) BYIL 151, 182):

‘The fundamental assumption underlying the investment treaty regime is clearly that an investor is bringing a cause of action based upon the vindication of its own rights rather than those of its national State.’

[2.40] Accordingly (at [18]):

‘the [BIT] would have to be regarded as conferring or creating direct rights in international law in favour of investors either from the outset, or at least (and in this event retrospectively) as and when they pursue claims in one of the ways provided. These alternative analyses are advanced by Douglas (pp 182–184). The former analysis is in our view natural and preferable, but it does not matter which applies.’

It is submitted that, whilst this declaration of principle is (with respect) correct, the second part of the last sentence of this extract should be treated with caution: which of the two analyses is applied may well matter in some cases, for instance, in the context of express waivers by investors of their rights of recourse under BITs made prior to effecting the investment.

[2.41] As for the law applicable to the arbitration agreement, this is considered – without any final determination – by the Court of Appeal at [33] and [34], with the court concluding as follows:

‘If English law recognises the binding force of a “quasi-statutory” adjudication at the international level, it is, in our view, hard to see why it should not be possible for a state and an investor to enter into an agreement to arbitrate of the type contemplated by the present bilateral investment treaty subject to international law.’

Enforcement of ICSID awards and immunity

[2.42] There has been increased interest from practitioners in England and abroad in this area of the law, in the wake of successful claims brought by investors against states or state entities: see, for example, the International Arbitration Institute's Colloquium on 'State Parties in International Arbitration' held in Paris on 20 October 2005 (the minutes of which should be published as part of the IAI Series on International Arbitration).

[2.43] *AIG Capital Partners Inc v Republic of Kazakhstan (National Bank of Kazakhstan intervening)* [2005] EWHC 2239 (Comm), [2006] 1 All ER 284, [2006] 1 All ER (Comm) 1 represents the first (or at least the first reported) attempt by an investor to enforce an ICSID award in England. Aikens J's judgment was handed down on 20 October 2005, and an appeal is pending.

[2.44] The claimants (hereinafter collectively referred to as AIG) had obtained an arbitration award from the International Centre for the Settlement of Investment Disputes (ICSID) against the state of Kazakhstan, and sought the enforcement of the award by obtaining final third party debt orders against cash and securities held by the third party (Mellon), pursuant to a global custody agreement with the National Bank of Kazakhstan (the BoK). The cash and security accounts formed part of a national fund that had been transferred by Kazakhstan to the BoK. Mellon held the accounts for the BoK under an agreement as custodian and banker. The agreement stipulated that the cash account represented a debt owed by Mellon to the BoK. AIG had obtained leave to register the award in the High Court and obtained interim third party debt and charging orders against the cash and securities held by Mellon. The BoK intervened in the proceedings and applied to discharge both of the interim orders on the basis that the cash and securities held by Mellon was their property and was the subject of immunity from enforcement under ss 13(2)(b) and 14(4) of the State Immunity Act 1978 (the SIA).

[2.45] The issues were: (a) whether the cash held by Mellon constituted a debt due or accruing due to the judgment debtor (Kazakhstan) from a third party (Mellon) within the terms of CPR 72.2; (b) what the scope of the word 'property' in s 14(4) of the SIA was, and whether the words 'property of a state's central bank or other monetary authority' in s 14(4) meant any property that was allocated to or held in the name of a central bank, irrespective of the capacity in which or the purpose for which that property was held; and (c) whether the cash and security accounts held in England by Mellon for the BoK were the property of a state's central bank within s 14(4) or the property of a state that was for the time being in use or intended for use for commercial purposes within s 13(4) of the 1978 Act. (AIG also raised an issue under the Human Rights Act 1998, which was dismissed by Aikens J and is not dealt with in this Review).

[2.46] Aikens J held that:

- (a) A third party debt order could not be made unless there was a debt due or accruing from a third party to the judgment debtor. In the instant case, the judgment debtor was Kazakhstan and the relevant third party was Mellon. The cash accounts held by Mellon in London were in the name of the BoK, not Kazakhstan, and were opened under an agreement that contained a condition that the cash accounts reflected a debt owed by Mellon to the BoK as the account holder. The fact that Kazakhstan had a beneficial interest in the cash accounts held by Mellon on the BoK's behalf did not mean that there was a debt due or accruing due to Kazakhstan in respect of those accounts: there was no contractual relationship between Kazakhstan and Mellon. Therefore, there was no debt due or accruing from Mellon to Kazakhstan. A third party debt order could not be made and the interim order already in force was discharged on that ground alone.
- (b) 'Property' had a wide meaning, it included real and personal property and embraced any right or interest, legal, equitable or contractual, in assets that were held by or on behalf of a state, or any emanation of the state, a central bank or other monetary authority that came within the definition of ss 13 and 14 of the SIA: see *Alcom Ltd v Republic of Colombia* [1984] 2 All ER 6. The words 'property of a state's central bank or other monetary authority' meant any asset in which the central bank had some kind of property interest, irrespective of the capacity in which the central bank held the assets or the purpose for which the assets were held. In the instant case, it was clear that the BoK had 'property' of some form and that Kazakhstan also had an interest in the property. Whatever the nature of the 'property' right of the BoK, the assets concerned were immune from the enforcement process.
- (c) The assets held by Mellon on behalf of the BoK were property of a central bank within the meaning of s 14(4) of the SIA as BoK had an interest in that property within the definition. All of the assets were immune from the enforcement jurisdiction of the UK courts. Even if that conclusion was wrong, the 'property' constituted the property of a state within the meaning of s 13(2)(b) of the SIA which were not at any time in use or intended for use for commercial purposes within the meaning of s 13(4). Therefore, the 'property' was immune from the enforcement jurisdiction of the UK courts by virtue of s 13(2)(b) of the SIA.

[2.47] This case underlines how difficult it is to state general principles of international application in this field. For instance, the IAI Colloquium referred to above appears to have proceeded upon a common assumption that, where an award has been made against a state, a state entity faced with an attempt at enforcement of that award against its assets has one, and only one, of two choices:

- (a) either it claims to be an entity separate from the state, thereby insulating the relevant assets from the award creditor (subject to any argument that that separate personality should be disregarded); or
- (b) it claims to be an integral part of the state, and to be entitled to immunity from execution in respect of the relevant assets on that ground.

[2.48] As the *AIG* case demonstrates, however, the position will ultimately always depend on the (necessarily idiosyncratic) rules of the forum of enforcement. In that respect, the applicable English rules can unfortunately be said to be more obscure than most, deriving as they do from a statute which has been criticised by the House of Lords for its ‘somewhat convoluted style’: see *Alcom* [1984] 2 All ER 6 at 10; cited with approval by Aikens J at [42].

A distinction without a difference – anti-suit injunctions and transfers of the arbitration clause

[2.49] The Court of Appeal’s distinction in *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd, The Hari Bhum* [2004] EWCA Civ 1598, [2005] 1 All ER (Comm) 715 between ‘being a party’ to an arbitration agreement and ‘being bound’ by an arbitration agreement was noted in All ER Rev 2004 at [2.23], where it was suggested that an answer to the problems which such a distinction would inevitably produce were possibly to be found in the Court of Appeal’s previous decision in *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH, The Jay Bola* [1997] 2 Lloyd’s Rep 279.

[2.50] The said distinction has now been considered at first instance on two occasions. Both Moore-Bick J and Colman J relied on *The Jay Bola* to explain or distinguish it thereby virtually depriving it (it is submitted) of any practical effect in the future.

[2.51] In *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd, The Hari Bhum (No 2)* [2005] EWHC 455 (Comm), [2005] All ER (D) 351 (Mar) Moore-Bick J had to rule on the Club’s application under s 18 of the Act for the appointment of an arbitrator (the facts of the case are extensively set out in All ER Rev 2004 at [2.15]–[2.23]). The Club, relying on the Court of Appeal’s determination that New India was ‘bound by the arbitration agreement’ is now of course keen to obtain an arbitration award declaring that it is not liable to New India under the insurance policy. Such an award could then in turn be converted into a judgment of the High Court, which could be used (in application of art 34.3 of the Judgments Regulation) to resist any attempt by New India to enforce a Finnish judgment to contrary effect against the Club in England (at [36]). New India is for its part determined to pursue its Finnish claim, and has refused to participate in the arbitration process. The Club therefore applied to the Commercial Court for the appointment

of an arbitrator under s 18 of the Act (failure of appointment procedure). New India opposed that application on the ground that, while the Court of Appeal had held that it (New India) was 'bound by the arbitration clause', it had also held that New India was not 'a party to the arbitration clause'.

[2.52] Moore-Bick J cut this Gordian knot in favour of the Club, relying in particular on the Court of Appeal's decision in *The Jay Bola* and on the House of Lords' decision in *Firma C-Trade SA v Newcastle Protection and Indemnity Association, The Fanti; Socony Mobil Oil Inc v West of England Shipowners Mutual Insurance Association (London) Ltd, The Padre Island (No 2)* [1990] 2 All ER 705. Applying these cases, the position of New India should *in fine* be considered as similar to that of an assignee of the insurance contract. While such an assignee of course only takes over the benefit and not the burden of the contract, this does not mean that it is free to enjoy that benefit otherwise than as provided for in the contract, namely by the means of the arbitration agreement. In other words, the obligation to arbitrate is part and parcel of the rights acquired by the assignee, and in the instant case of the rights acquired by New India (see at [25], where Moore-Bick J held that 'however one describes its position, New India is seeking to enforce a chose in action which is subject to certain inherent limitations, including the obligation to enforce it by arbitration in London'). For those reasons, Moore-Bick J held that:

'New India is to be considered as a party to an arbitration agreement with the Club [for the purposes of ss 14(4) and 15(3) of the Act] because by the time [the Club decided to commence arbitration against New India], [New India] had made a claim against the Club under or through [the insured party].'

[2.53] In *West Tankers Inc v Ras Riunione Adriatica Di Sicurta, The Front Comor* [2005] EWHC 454 (Comm), [2005] 2 All ER (Comm) 240 Colman J reached a similar conclusion. The case concerned a collision between a vessel and the berth of an Italian oil refinery. The refinery commenced arbitration against the shipowners under the charterparty for the uninsured part of the loss. The Italian insurers for their part thought it best not to join that arbitration or commence an arbitration of their own under the charterparty, but to sue the shipowners before the Italian courts in respect of the insured part of the loss. Colman J ordered anti-suit injunctive relief against the insurers, holding that:

- (a) (Applying Italian law) the insurers were subrogated to the rights of action in tort of the insured to the extent of the insured part of the loss, but that (applying English law as the law applicable to the arbitration agreement), the obligation of the insurers to have recourse to arbitration was part and parcel of the rights so transferred from insured to insurer.
- (b) (Applying *The Hari Bhum*) *Turner v Grovit* Case C-159/02 [2004] ECR I-3565, [2004] 2 All ER (Comm) 381, [2004] All ER (EC) 485 was not applicable in matters relating to arbitration.

- (c) '[I]t is established by authority binding [at first instance] that [the] attitude of a foreign court [to the grant of anti-suit relief by the English court] can be treated as irrelevant, at least where the anti-suit injunction is in support of an arbitration agreement.' (at [46])
- (d) '[I]t will normally be appropriate to grant an anti-suit injunction against a subrogated insurer who pursues a claim by court proceedings inconsistently with an arbitration agreement binding on its assured and notwithstanding that the insurer has not become liable for damages for breach of the agreement to arbitrate.' (at [67])

[2.54] On the facts of the case, Colman J was able to distinguish the Court of Appeal's distinction between 'being a party' to an arbitration agreement and 'being bound' by an arbitration agreement on the simple ground that *The Hari Bhum* was not a case of subrogation (see [62]–[63] – paras [59]–[72] deal with 'The insurers' submission that there was no actionable breach of the agreement to arbitrate'). He went further, however, and appears to have opened the door for an argument that *The Hari Bhum* was decided per incuriam as *The Jay Bola* was 'not cited to the Court of Appeal in [*The Hari Bhum*]' (see at [67]).

[2.55] The upshot of these two first instance cases appears to be that:

- (a) The Court of Appeal's distinction may now be said to have been deprived of any practical relevance – its only potential incidence being as to the availability or otherwise of a claim for damages for breach of the arbitration agreement (see *The Front Comor* at [67], [69]).
- (b) The courts should in cases of assignment as in cases of statutory transfer apply principles analogous to those in *Aggeliki Charis Compania Maritima SA v Pagnan SpA*, *The Angelic Grace* [1995] 1 Lloyd's Rep 87 to the grant of anti-suit injunctive relief (see *The Front Comor* at [70]–[72]: injunction to be granted 'unless strong cause were shown to the contrary').

Enforcement of foreign awards under the New York Convention (Part III of the Act)

[2.56] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corpn* [2005] EWHC 726 (Comm), [2005] All ER (D) 385 (Apr) concerned the familiar situation of an award creditor (in this case IPCO) seeking to enforce a foreign award in this jurisdiction in circumstances where the award debtor (in this case NNPC) is for its part seeking to have the award set aside 'by a competent authority of the country in which or under the law of which [the award] was made' (see s 103(2)(f) of the Act, reproducing art V(1)(e) of the New York Convention). In the present case, the relevant award was a Nigerian award between two Nigerian companies relating to the construction of the Bonny Island gas and petroleum export terminal in the Port Harcourt area of Nigeria. (Although the judgment does not state

this as such, it appears reasonably clear that IPCO (Nigeria) Ltd was not altogether a local Nigerian company, but the subsidiary of a foreign contractor).

[2.57] The leading case in this area remains the Court of Appeal's decision in *Soleh Boneh International Ltd v Government of Republic of Uganda and National Housing Corp'n* [1993] 2 Lloyd's Rep 208. Gross J's decision in the *IPCO* case is notable for his (it is submitted) clear and helpful summary of the relevant applicable principles at [11]–[16], which are reproduced in part below:

'11. For present purposes, the relevant principles can be shortly stated. First, there can be no realistic doubt that s 103 of the Act embodies a pre-disposition to favour enforcement of New York Convention Awards, reflecting the underlying purpose of the New York Convention itself; indeed, even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award: *Mustill and Boyd Commercial Arbitration* (2nd edn, 2001) *Companion* at p 87.

12. Secondly, s 103(2)(f) is only applicable when there has been an order or decision suspending the award by the court in the country of origin of the award ("the country of origin"). Section 103(2)(f) is not triggered automatically by a challenge brought before the court in the country of origin. This conclusion flows from the wording of s 103(2)(f) itself, it is supported by leading commentators (*Van den Berg The New York Convention of 1958* (1981) p 352, Fouchard, Gaillard, Goldman *International Commercial Arbitration* (1999), pp 980–981) and it is consistent with the provisions of ss 103(5) of the Act – which would be otiose, or at least curious, if an application to the court in the country of origin automatically resulted in the award being suspended.

13. Thirdly, considerations of public policy, if relied upon to resist enforcement of an award, should be approached with extreme caution: *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v R'as Al Khaimah National Oil Co* [1987] 2 All ER 769. The reference to public policy in s 103(3) was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards. Instead, the public policy exception in s 103(3) is confined to the public policy of England (as the country in which enforcement is sought) in maintaining the fair and orderly administration of justice: *Mustill and Boyd* at 91–92.

14. Fourthly, s 103(5) "achieves a compromise between two equally legitimate concerns": *Fouchard* at 981. On the one hand, enforcement should not be frustrated merely by the making of an application in the country of origin; on the other hand, pending proceedings in the country of origin should not necessarily be pre-empted by rapid enforcement of the award in another jurisdiction. Pro-enforcement assumptions are sometimes outweighed by the respect due to the courts exercising jurisdiction in the country of origin – the venue chosen by the parties for their arbitration: *Mustill and Boyd* at 90.

15. Fifthly, the Act does not furnish a threshold test in respect of the grant of an adjournment and the power to order the provision of security in the

exercise of the court's discretion under s 103(5). In my judgment, it would be wrong to read a fetter into this understandably wide discretion (echoing, as it does, article VI of the New York Convention). Ordinarily, a number of considerations are likely to be relevant: (i) whether the application before the court in the country of origin is brought bona fide and not simply by way of delaying tactics; (ii) whether the application before the court in the country of origin has at least a real (ie realistic) prospect of success (the test in this jurisdiction for resisting summary judgment); (iii) the extent of the delay occasioned by an adjournment and any resulting prejudice. Beyond such matters, it is probably unwise to generalise; all must depend on the circumstances of the individual case. As it seems to me, the right approach is that of a sliding scale, in any event embodied in the decision of the Court of Appeal in *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208 in the context of the question of security: [his Lordship quoted from the judgment of Staughton LH at 212 of the report, identifying two important factors on such an application being (i) the strength of the argument that the award is invalid, and (ii) the ease or difficulty of enforcement of the award, and whether it will be rendered more difficult if enforcement is delayed.] See too: *Fouchard* at 982; *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [2002] 1 All ER (Comm) 819.

16. Sixthly, it is pertinent to underline that the New York Convention contains no nationality condition (unlike the Geneva Convention of 1927) and is thus applicable, as here, when an award is made abroad in an arbitration between parties of the same nationality: *Van den Berg* at 15–19. While primarily the New York Convention was undoubtedly intended to facilitate international arbitration rather than the enforcement in a foreign country of a domestic arbitration award, the benefits of the New York Convention are available to a party seeking enforcement in the latter case also. Such cases are necessarily rare but it would be wrong to introduce a nationality condition into the New York Convention by the backdoor. So, for example, the fact of a party's nationality would (by itself) be irrelevant to the availability of a ground for resisting enforcement under s 103(2) or (3) of the Act. All that said, in the exercise of the discretion under s 103(5) of the Act, the fact that the arbitration was domestic in the country of origin, must generally be likely to enhance the deference due to the court exercising supervisory jurisdiction in that country. Comity and common sense are likely to require no less; pre-empting the decision on a challenge to an award before the court exercising supervisory jurisdiction in the country of origin would be a strong thing in a case where all parties were domiciled or incorporated in that country.'

(With respect to this sixth and last principle, it is submitted that his Lordship should have given some weight to the fact that many such domestic parties will in fact be single-purpose vehicles of non-domestic companies incorporated for the sake of a given project. As noted above, this appears to have been the case in the *IPCO* case itself.)

[2.58] His Lordship went on to apply these principles to the facts of the case, using for his assessment of the merits of the Nigerian challenge to the award a 'real prospect of success' test (see eg at [39], [43], [48]), apparently derived from the Civil Procedure Rules' test for summary

judgment (which also now applies to jurisdictional challenges under CPR Pt 11: *De Molestina v Ponton* [2002] 1 All ER (Comm) 587).

[2.59] Another case on the enforcement of New York Convention awards came before the courts in the course of 2005, leading to two successive decisions of the court, first by Mr Nigel Teare QC sitting as a deputy judge of the Commercial Court (*Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2005] EWHC 9 (Comm), [2005] 1 All ER (Comm) 515), and then by Gloster J (*Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)* [2005] EWHC 2437 (Comm), [2005] All ER (D) 140 (Nov)). The facts of the case as set out in the following paragraphs are taken from both judgments.

[2.60] The claimant oil company (Svenska) sought to enforce an ICC award obtained in Denmark against a former Lithuanian state company (Geonafta) and the Lithuanian State (Lithuania). The Danish arbitration and the ensuing Danish award arose out of a joint venture agreement between Svenska, on the one hand, and Geonafta and Lithuania, on the other, relating to the planned exploitation of various oil fields in Lithuania. The agreement contained an arbitration clause, was expressly governed by Lithuanian law, and provided (by its cl 35) that both Lithuania and Geonafta waived all right to sovereign immunity.

[2.61] Svenska and Geonafta had signed the agreement as the 'founders' or incorporating shareholders of the relevant joint venture company, each holding 50% of the shares. Lithuania had approved the agreement, and undertaken to be bound by the agreement as a signatory. The arbitration clause referred to arbitration between the 'founders'. Svenska commenced arbitration against both Geonafta and Lithuania. Lithuania contested the jurisdiction of the arbitral tribunal on the ground that it was not a party to the arbitration clause, as that clause was only expressed to apply to the two 'founders', Svenska and Geonafta. The tribunal rejected that jurisdictional objection in a 69-page interim award ('the interim award'). Lithuania did not challenge the interim award before the Danish courts, and participated in a 13-day hearing on the merits which led to the issue of a final award of damages in favour of Svenska against both Geonafta and Lithuania.

[2.62] Svenska applied to the English court under Pt III of the Arbitration Act 1996 seeking permission to enforce the final award, and obtained that permission. Judgment on the award was in the event entered against Geonafta. Lithuania for its part applied (the Setting Aside application) to have the order permitting enforcement to be set aside on the ground that, as an independent sovereign state, it was immune from the jurisdiction of the court.

[2.63] Svenska then applied to have the state's Setting Aside application struck out or alternatively dismissed under CPR Pt 24, on the ground that

Lithuania had no real prospect of successfully defending the claim for enforcement because it was estopped by the tribunal's finding in the interim award from arguing that it was not a party to the arbitration agreement.

[2.64] It is that application which first came before the courts in January 2005. Mr Nigel Teare QC sitting as a deputy judge of the Commercial Court held in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania* [2005] EWHC 9 (Comm), [2005] 1 All ER (Comm) 515 that:

- (a) For any issue estoppel to arise, it was first necessary for the court to recognise the interim award under s 101 of the Act (at [6]).
- (b) Section 103(1) provided that recognition should not be refused except where the person against whom recognition is invoked proves any one of the matters listed in s 103(2). Proof that the person against whom recognition is invoked was not a party to the arbitration agreement falls within s 103(2)(b) of the Act: see *Dardana Ltd v Yukos Oil Co* [2002] EWCA Civ 543, [2002] 1 All ER (Comm) 819 at [7], [8].
- (c) (Applying *Dardana*) the court retained a discretion to recognise an award even where one of the grounds for setting aside under s 103(2) was made out. 'The discretion is not an "open" discretion but is only to be exercised where "despite the original existence of one or more of the listed circumstances, the right to rely on them has been lost, by for example, another agreement or estoppel" or where there are circumstances "which might on some recognisable legal principle affect the prima facie right to have an award set aside arising in the cases listed in s 103(2)"' (at [19]).
- (d) Having regard in particular to s 73 of the Act (loss of the right to object) and to the change in English law operated by that section of the Act (at [23]), Svenska was entitled to rely on a 'recognisable legal principle' which affected the government's prima facie right to a refusal of recognition of the interim award (at [22]). This 'recognisable legal principle' was apparently that of issue estoppel, to which the principle recognised in s 73(2) of the Act was 'analogous' (at [26](i)).
- (e) The court would exercise its discretion under s 103(2) in favour of Svenska and recognise the interim award notwithstanding any potential ground for resisting enforcement under s 103(2)(b) given that: (i) Lithuania had participated in a two-day jurisdictional hearing; (ii) the arbitral tribunal decided that issue against Lithuania in a reasoned interim award; (iii) having lost on that issue, Lithuania did not seek to challenge that interim award before the Danish courts; (iv) Lithuania participated in a 13-day hearing on the merits which resulted in a final award against it (in this respect, it should be noted that Lithuania's written submissions to the arbitral tribunal formally maintained its objection to jurisdiction: see *Gloster J* in

Svenska (No 2) at [19]); (v) Lithuania had not sought to challenge that final award before the Danish courts, but instead sought to resist enforcement on the ground of immunity, a contention which could only be made good if Lithuania proved that it was not party to the arbitration agreement, contrary to the arbitral tribunal's decision in the interim award (at [27]).

- (f) Svenska could not, however, rely on an issue estoppel to defeat Lithuania's setting aside application since it could not be said that the interim award was a 'final and conclusive' determination of the issue of jurisdiction in favour of Svenska (at [38]).

[2.65] The case then came before Gloster J on the hearing of the setting aside application. Her Ladyship held that:

- (a) The waiver of immunity contained in cl 35 of the joint venture agreement did not constitute a written submission to the jurisdiction of the English court within the meaning of s 2 of the State Immunity Act 1978 (SIA).
- (b) The joint venture agreement was a commercial transaction within the meaning of s 3 of the SIA, but the final award and its enforcement were not.
- (c) As a matter of Danish law, it was no longer open to Lithuania to challenge the interim award before the Danish courts, and the interim award therefore gave rise to an issue estoppel debarring Lithuania from arguing before the English court that it was not a party to the arbitration agreement.
- (d) In any event, if that was wrong, then as a matter of Lithuanian law Lithuania was bound by the arbitration agreement.
- (e) Proceedings for the recognition and enforcement of an award were proceedings 'which relate to the arbitration' within the meaning of the SIA, s 9, and Lithuania therefore enjoyed no immunity from enforcement.

[2.66] It is submitted that the approach of Mr Teare QC to the question of recognition of the foreign award, which was endorsed and applied by Gloster J, is – with respect – open to some doubt for the following reasons:

- (a) While there is no doubt that there is a 'residual discretion' introduced by the word 'may' in the opening phrase of s 103(2), the nature and content of that discretion is (to use the words of Colman J in *Minmetals Germany GmbH v Ferco Steel* [1999] 1 All ER (Comm) 315 at 331) not clearly defined as a matter of English law. In *Dardana*, Mance LJ alluded obiter (at [8]) to the possibility of it being used where 'despite the original existence of one or more of the [exceptions to enforcement in s 103(2)], the right to rely on them had been lost, by for example another agreement or estoppel'. A different view of the discretion appears to have been taken by Longmore J in *China Agribusiness Development Corpn v Balli Trading* [1998] 2 Lloyd's Rep 76 at 79, a decision not cited to the

Court of Appeal in *Dardana*. See also A J van den Berg *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* p 265, referred to by Mance LJ in *Dardana*.

- (b) the learned deputy judge's use of that discretion would have short-circuited any need for a consideration of the objection to recognition raised by Lithuania (here, the lack of an arbitration agreement within s 103(2)(b) of the Act). If such an approach were correct, the first question for the English courts on any application opposing enforcement or recognition of a New York Convention award would be whether the particular objection to recognition or enforcement could be the subject of an issue estoppel or could be said to have been waived. This question would in turn always require consideration of the extent to which the determination of the particular issue in the award (inevitably in favour of the party seeking enforcement) could be said to be 'final and binding'. Ultimately, such an approach would largely substitute English rules of law relating to issue estoppel and/or waiver to the international scheme of the New York Convention. (See, apparently *contra*, but not considering this point: Mustill and Boyd on *Commercial Arbitration, Companion Volume* (2001) pp 87–91.)
- (c) Nor is *Minmetals Germany GmbH v Ferco Steel* [1999] 1 All ER (Comm) 315 (which was relied on by the learned deputy judge (at [24])) authority for such an approach. In that case, Colman J expressly stated (at 331) that: '[he had] not decided to uphold enforcement on the basis of a residual discretion but on the basis that Ferco have failed to bring themselves within any of the s 103 exceptions to enforcement.' As the remainder of Colman J's judgment makes clear, the judge considered and dismissed the particular objection to enforcement raised by Ferco Steel (namely that 'it had been unable to present its case' within the meaning of s 103(2)(c) of the Act) on the ground that Ferco Steel had been given an opportunity to correct any irregularity in the arbitral process but had failed to avail itself of that opportunity. In other words, there had been no irregularity such as to bring into play s 103(2)(c).
- (d) The deputy judge's reliance on s 73 of the Act again constitutes reliance on an English domestic rule (contained in Pt I of the Act, and applicable only to arbitrations with an English seat (see s 2(1) of the Act)) in the context of the application of the New York Convention (as enacted in Pt III of the Act). It is not clear from the learned deputy judge's judgment why such a reliance is said to be 'legitimate'.
- (e) The above considerations apply with added force in the context of an objection to enforcement on the ground that the arbitral tribunal lacked jurisdiction under s 103(2)(b) of the Act, as noted by Van den Berg in *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* p 312:

‘... the Convention does not imply that the arbitrator may give a final decision on his competence (the question of so-called *Kompetenz-Kompetenz*). Under almost all arbitration laws the arbitrator has no power to give such final decision; as arbitration excludes the competence of the courts, which is considered as a far-reaching effect, the courts retain the last word on this matter. Many laws, however, allow the arbitrator to give a provisional ruling on his competence in order not to delay the arbitration and to alleviate dilatory tactics by obstructive respondents. This principle that the court has the last word on the arbitrator’s competence is not different for the New York Convention. If it were otherwise, the Convention would have contained express provisions to that effect in order to make clear that it deviates from the prevailing principle of the national arbitration laws. Thus, regardless of the arbitrator’s opinion that the arbitration agreement is valid, if the agreement is proven to be invalid, enforcement may be refused under article V(1)(a).’

- (f) For these reasons, it is submitted that the issue whether Lithuania had lost or waived the right to challenge the jurisdiction of the arbitral tribunal was an issue which should have been decided by the court as part of a determination of the exception to enforcement contained in s 103(2)(b) of the Act, applying the choice of law rules contained in that section, and not as part of the consideration of the ‘residual discretion’, applying English rules of issue estoppel and/or the English definition of waiver contained in s 73 of the Act. This would have entailed – in particular – consideration of the effect (if any) of Lithuania’s continued objection to the tribunal’s jurisdiction at the hearing on the merits in the arbitration (see at [2.64](e) above). That such a continued objection was registered at the hearing on the merits is not mentioned in the deputy judge’s judgment.

[2.67] In the circumstances, it is submitted that the *Svenska* case should not be seen as having conclusively determined the issues of principle relating to the scheme of the New York Convention touched upon in that case.

Successful removal of an arbitrator on the ground of apparent bias

[2.68] In *ASM Shipping Ltd of India v TTMI Ltd of England* [2005] EWHC 2238 (Comm), [2005] All ER (D) 271 (Nov) the applicant owners (ASM) challenged an arbitration award on the basis that one of the three arbitrators should have recused himself. ASM had chartered its vessel to the respondent charterers (TTMI) to carry a cargo of gas oil. The vessel had been arrested and after the arrests were lifted the vessel was late arriving at the nominated load port. TTMI claimed that by reason of the vessel’s late arrival they had suffered substantial losses. The dispute was referred to arbitration. ASM counterclaimed for unpaid freight and demurrage. There was a substantial dispute in the arbitration as to whether ASM had properly complied with its obligation to give disclosure. Before a hearing in the arbitration ASM’s principal witness (a

Mr Moustakas) told ASM's solicitor that the third arbitrator (referred to in the judgment as 'X QC'), a Queen's Counsel who had been nominated by the other two arbitrators, had close connections with TTMI's solicitors. ASM objected to X QC continuing to sit on the basis that he had acted for other charterers, instructed by TTMI's solicitors, in another case in which serious allegations had been made against Mr Moustakas in relation to disclosure. X QC declined to recuse himself. Thereafter, the tribunal determined a number of preliminary issues largely in TTMI's favour and ASM took up the interim award and paid it.

[2.69] Morison J held that:

- (a) (Applying *Porter v Magill*, *Weeks v Magill* [2001] UKHL 67, [2002] 1 All ER 465) X QC should have recused himself because an objective and independent observer considering the facts would have shared the feeling of discomfort expressed by M about X QC's impartiality and would have concluded that there was a real possibility of bias. It was not necessary to draw a distinction between cases where there was a foreign party and those where there was not. The objective observer was there to ensure an even handed approach to apparent bias, whatever the nationality of the parties: see *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2004] 1 All ER 187.
- (b) In specialist arbitrations prior contact between parties and their lawyers and arbitrators was to be expected and the mere fact that a person selected as arbitrator had previously had a trade dispute with one of the parties would not cause an objectionable situation. However, each case depended on its own facts and in the instant case there was a pattern of complaint amounting to dishonesty in relation to disclosure being made by the same solicitors in each case, and X QC had played a part in the disclosure exercise in another case seven months before the arbitration.
- (c) If the properly informed independent observer concluded that there was a real possibility of bias, that was a species of 'serious irregularity' which had caused substantial injustice to the applicant within s 68 of the Act. There could be no more serious or substantial injustice than having a tribunal which was not, on that assumption, impartial, determine the parties' rights. The right to a fair hearing by an impartial tribunal was fundamental and if the tribunal was not impartial then the requirements of s 68 were satisfied. The court would intervene without the need to show that the bias had caused prejudice; in that respect Morison J 'profoundly disagreed' with the judgment of Judge Bowsher in *Groundshire v VHE Construction* [2001] BLR 395.
- (d) A refusal to grant an application for an adjournment made by ASM was no evidence of bias whether actual or apparent.
- (e) X QC should not continue to act in the matter but by taking up the

interim award ASM had lost any right to object to X QC's involvement in that part of the arbitral process.

[2.70] The case provides further guidance at a time when allegations of arbitrator bias and of lack of 'independence and impartiality' have become a common feature of both domestic and international arbitration. (The two terms 'independence' and 'impartiality' are amalgamated by the learned judge at [14] ('... s 24 of the 1996 Act ... refers to "independence" rather than "impartiality" [a difference without a distinction]') and it is submitted that this is per incuriam: see for instance in this respect Mustill and Boyd *Commercial Arbitration, Companion Volume* (2001) p 96. While the concepts are linked, they are not identical.) The case is also interesting for the first mention in an English reported case of the IBA Guidelines on Conflicts of Interest in International Arbitration (at [32]). The Guidelines are a valiant attempt to set down guidelines to issues of disclosure, bias and recusal and attempts to list certain factual scenarii according to their gravity in a Green, Orange or Red List. As the present case illustrates, however, these guidelines and lists can ultimately only be of limited assistance to the English courts, which will apply English principles (as currently set out in the *Lawal* and *Magill* cases in particular) to those issues.

Powers of the court under s 44(3) of the Act – *Hiscox v Dickson* disapproved

[2.71] In *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 4 All ER 52, [2005] 2 All ER (Comm) 203 the Court of Appeal had occasion to consider the scope of s 44(3) of the Act, which empowers the court to 'make such orders as it thinks necessary for the purpose of preserving evidence or assets' where 'the case is one of urgency'.

[2.72] In *Hiscox Underwriting Ltd v Dickson Manchester & Co Ltd* [2004] EWHC 479 (Comm), [2004] 1 All ER (Comm) 753 (noted in All ER Rev 2004 at [2.62]–[2.66]), Cooke J gave these words a wide meaning, on the basis that s 44(3) was permissive and not prohibitive. The Court of Appeal in *Cetelem* has now overruled *Hiscox* on this point, and has held that on the true construction of s 44(3) (having regard in particular to the DAC Report), if the case was one of urgency, the court only had jurisdiction to make such orders as it thought necessary for the purpose of preserving evidence or assets. The Court of Appeal went on to deprive that narrow construction of much practical effect, by giving a wide meaning to the word 'assets' in the subsection.

[2.73] On the facts of the case, the appellant (Roust) sought to appeal against an order granting the respondent (Cetelem) an interim mandatory injunction against it, and continuing a freezing order. Roust had agreed to sell to Cetelem an interest in a company. The sale was intended to effect the indirect transfer to Cetelem of half the shares in a Russian bank indirectly owned by Roust and approval of the Russian Central Bank was

a condition precedent of the sale agreement. The time by which Cetelem thought Roust should have submitted documents to the Central Bank to secure approval passed. Cetelem obtained the freezing order, which restrained Roust from dealing with its own assets, and the interim injunction, pursuant to the Arbitration Act 1996, s 44, which required Roust to produce all documents necessary to accompany the application for authorisation by the Central Bank of the transfer of certain shares by Roust's subsidiary to the company, and of the sale of the shares in the company to Cetelem.

[2.74] The Court of Appeal held that, while s 44(3) only permitted the granting of orders for the preservation of 'evidence or assets', there was no reason why a contractual right should not be an 'asset' within the meaning of s 44(3). Parliament intended to give the court powers to assist the arbitral process which were wide enough to include an order such as that in the instant case, and there was nothing in the DAC's Report to suggest that the court should not have the power to assist the process in that way. The right to purchase the shares under the sale agreement was an asset within s 44(3) and the court had jurisdiction to grant the injunction under that section, even though it did not have the wider discretion that it had been held to have in *Hiscox*. If the judge had been asked to make the same order on the narrower basis that it was necessary for the purpose of preserving assets, he would have done so. There was no reason why a contractual right should not be an 'asset' within the meaning of s 44(3).

[2.75] The case is also interesting for the Court of Appeal's decision on the circumstances in which the Court of Appeal could grant permission to appeal from a first instance decision under s 44 where the first instance judge had refused permission to appeal.

Section 72 and *kompetenz kompetenz*

[2.76] *Law Debenture Trust Corpn plc v Elektrim Finance BV* [2005] EWHC 1412 (Ch), [2005] 2 All ER (Comm) 476 raises yet more questions as to the type of *kompetenz kompetenz* which currently exists in England and Wales. The principle is of course enshrined in s 30 of the Act. As noted above (at [2.66](b)), the principle is not meant to give an arbitral tribunal jurisdiction finally to determine its own jurisdiction (although it is open to the parties expressly to agree that the arbitral tribunal will finally and conclusively determine its own jurisdiction: see *LG Caltex Gas Co Ltd v China National Petroleum Corp* [2001] EWCA Civ 788, [2001] 4 All ER 875, [2001] 2 All ER (Comm) 97), but should rather be seen as a rule of priority: it is for the tribunal to determine its own jurisdiction in the first instance, subject to the court's right of supervision by way of a rehearing (not a review) (see eg *Peterson Farms Inc v C&M Farming Ltd* [2004] EWHC 121 (Comm), [2004] All ER (D) 50 (Feb), reviewed in All ER Rev 2004 at [2.50]–[2.51]). That rule of priority has

already been eroded in England to some extent, mainly for reasons of case management (with the courts being – understandably – concerned with the time and cost wasted by a rehearing before the courts of issues fully canvassed before the arbitral tribunal): see *Birse Construction v St David Ltd* [2000] BLR 57; *Al-Naimi (trading as Buildmaster Construction Services) v Islamic Press Services Inc* [2000] All ER (D) 86 (both cases where the issue of jurisdiction arose in the form of applications for a stay under s 9 of the Act).

[2.77] As for the options open to a party challenging jurisdiction under the Act, these were described by Rix J in *Azov Shipping Co v Baltic Shipping Co* [1999] 1 All ER 476 in the following terms (at 477–478):

‘Where a challenge to an arbitrator’s substantive jurisdiction is made, the party that challenges the jurisdiction has a number of options under the Act. It may agree to participate in the argument before the arbitrator of the question of his competence and jurisdiction: see s 30 of the Act. It may do so while reserving its right to challenge the arbitrator’s award as to his own competence (see s 67) ...

Alternatively, it may seek, without arguing the matter before the arbitrator, to promote the determination of the preliminary point of jurisdiction by the court under s 32 ...

The third option of someone disputing an arbitrator’s jurisdiction is to stand aloof and question the status of the arbitration by proceedings in court for a declaration, injunction or other appropriate relief under s 72 of the Act. In such a case he is in the same position as a party to arbitral proceedings who challenges an award under s 67 on the ground that there was no substantive jurisdiction.’

[2.78] The question arises as to the interaction of these rights of recourse. The above extract from Rix J’s judgment would suggest the following:

- (a) A party wishing to ask the court to determine the issue of substantive jurisdiction in lieu of the tribunal at the outset of the proceedings would normally have to apply under s 32, which requires the consent of the other party(ies) or of the tribunal.
- (b) The next option in time is to participate in the jurisdictional hearing before the arbitrators and then challenge it before the court under s 67.
- (c) Finally, s 72 appears designed to cover the case of a party which allows the arbitration to proceed without taking any part therein. Such a party is then allowed to apply under s 72 (which is available without any of the consent requirements of s 32 and without the time constraints of s 67). It should be said, however, that there is nothing in the wording of s 72 which expressly prevents a party having recourse to that section until after the determination of the issue of jurisdiction by the tribunal.

[2.79] In *Law Debenture Trust Corpn plc v Elektrim Finance BV* [2005] All ER (D) 100 (Nov) Mann J held that it was in fact open to a party challenging the jurisdiction of the tribunal to ask the court to determine the issue of jurisdiction under s 72 before the tribunal had had a chance of deciding that issue. While, as noted above, there does not appear to be anything in the wording of s 72 which directly precludes such a conclusion, this result does appear to create a further inroad into the principle of *kompetenz kompetenz* (as summarised above), and would appear to render nugatory the right of recourse under s 32.

Commercial Law

ROBERT MERKIN, LLB, LLM

*Professor of Commercial Law, University of Southampton; Consultant,
Barlow Lyde & Gilbert*

Agency

[3.1] In *Lister & Co v Stubbs* (1890) 45 Ch D 1, [1886–90] All ER Rep 797 a strong Court of Appeal ruled that bribes paid to the claimants' agent were held by him in his capacity as debtor to the claimants and not in any fiduciary capacity. The consequence of that ruling was that any claim by a principal against his agent for recovery of a bribe paid to the agent is not proprietary in nature, so that the principal cannot take in priority to the agent's unsecured creditors. The decision has over the years been the subject of much controversy. It has been supported on the ground that the bribe paid to the agent would not have accrued to the principal so that there is ground for a proprietary claim. It has been disputed by reference to the simple proposition that an agent is a fiduciary so that sums obtained by him in breach of his fiduciary duties are impressed with a constructive trust. In *A-G for Hong Kong v Reid* [1994] 1 All ER 1 the Privy Council, including four Law Lords, one of whom was that master of restitution Lord Goff, opted firmly for the latter approach. Rules of precedent strictly applied treat a Privy Council decision as persuasive only, so that, strictly speaking, *Lister & Co v Stubbs* remains good law. In *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch), [2005] 4 All ER 73 Lawrence Collins J was faced with the argument that *Lister & Co v Stubbs* should be followed and that *Reid* should be disregarded. The case concerned bribes of some £1.8m paid to the claimants' agent, K, by the first four defendants in respect of contracts obtained by the defendants from the claimants. The claimants sought to recover the amount of the bribe from K. Lawrence Collins J concluded from the evidence that K had acted as agent and not in some lesser capacity, and rejected a series of technical defences raised by K. The ultimate issue was whether the funds obtained by K were held by him as debtor or in a fiduciary capacity as a result of which the claimants could assert proprietary rights over the funds. In the event Lawrence Collins J was not required to choose between the two earlier cases, as the evidence established that the claimants believed that the full sum paid by them was going to the defendants when in fact part of it was being diverted to K: the situation was, therefore, one in which the agent had misappropriated the property of the principal and a proprietary remedy was appropriate. Lawrence Collins J did nevertheless consider what his approach might have been had this been a bribe not obtained at the claimants' expense,

and his clear view was that *Reid* should be followed in preference to *Lister*, in that a decision of a Privy Council constituted mainly of serving Law Lords ought to given priority, and in that the principle adopted by the Privy Council was the correct one: there was no injustice to unsecured creditors in giving the principal a proprietary remedy against an agent who obtained from his position funds which he ought not to have ever had in the first place. (See [8.23] and [16.41] below for further discussion.)

Bailment

[3.2] Where property in the possession of the bailee is damaged by a third party, may a bailor with a reversionary interest only bring an action for damages against the third party? The answer given by David Steel J in *HSBC Rail (UK) Ltd v Network Rail Infrastructure Ltd (formerly Railtrack plc)* [2005] EWHC 403 (Comm), [2005] 1 All ER (Comm) 689 is that such an action is possible only if permanent damage to the reversion can be demonstrated. HSBC owned train rolling stock, although this was leased to a train-operating company, GNER, under a master leasing agreement (MOLA). The MOLA transferred all risk of loss or damage to GNER, and GNER insured the rolling stock against damage in the names of itself and HSBC. Damage was suffered following a derailment, due to the alleged negligence of NR (the successor to Railtrack as the owner of the network itself) in leaving dangerous rails unrepaired. The insurers indemnified GNER and then sought to exercise subrogation rights in the name of HSBC against NR. The subrogation action could necessarily only succeed to the extent that HSBC could itself have made a claim against NR. The question was whether HSBC had suffered any loss in the light of the fact that the rolling stock had been repaired. David Steel J, after a review of the authorities, most of which emanated from the nineteenth century, concluded that a bailee was in an anomalous position in that he was entitled to recover by way of damages from a third party the full value of the subject matter and that a bailor with a bare reversionary title did not have a right of recovery co-extensive with that of the bailee. The bailor's rights were confined to damages representing the harm done to the reversion, and in a case such as the present, where the damage had been repaired, there was no loss suffered by HSBC. David Steel J also pointed out that the person indemnified by the insurers had been GNER and not HSBC, so that the insurers could not in any event claim subrogation rights because they had not indemnified the person in whose name the action had been brought. The learned judge's decision was subsequently upheld by the Court of Appeal ([2005] EWCA Civ 1437, [2006] 1 All ER 343) on the same reasoning.

Banking

Duties to customers

[3.3] It is trite law that a bank owes a duty of confidentiality to its customer. The question addressed by the House of Lords in *Jackson v*

Royal Bank of Scotland [2005] UKHL 3, [2005] 2 All ER 71, [2005] 1 All ER (Comm) 337 was the measure of damages where breach of that duty results in the disclosure of embarrassing information which prejudices the customer's commercial contracts. The claimant was a partner in Samson, a firm which imported goods from the Far East for resale in the UK. Samson obtained a contract from another firm, Economy Bag, under which Samson was to import dog chews and supply them to Economy Bag which would then sell them to wholesale and retail customers. Both firms used the defendant bank as their bankers. Starting in September 1990, Economy Bag placed a series of orders with Samson under which dog chews were to be delivered by Samson to Economy Bag's premises in Preston. It was agreed that payment under each would be secured by a transferable letter of credit issued by the bank on behalf of Economy Bag, with Samson being named as beneficiary. Payment by the bank was to be on production of the relevant sale and insurance documents. Samson charged a different percentage mark-up on each transaction, the amount of which was not disclosed to Economy Bag. The dispute between the parties arose in January 1993, when the bank erroneously sent a completion statement to Economy Bag instead of to Samson: this revealed that Samson had been making substantial profits by way of mark-up. Economy Bag terminated its relationship with Samson, although four existing contracts were performed. Thereafter, Economy Bag obtained its supplies from elsewhere, and in the three succeeding years Economy Bag purchased goods from its new supplier to a value of just under US\$1.5m. Samson was unable to survive the loss of business and was dissolved. The claimant commenced proceedings against the bank, seeking to recover its lost profits. At first instance his Honour Judge Kershaw QC held that the bank was in breach of its duty of confidence and further held that Samson's loss could be measured by discounted projected profit over the succeeding four years. The Court of Appeal reduced the damages to one year's loss of profits. The claimant appealed, seeking reinstatement of damages representing the four-year period. The case thus raised a nice issue of remoteness. Their Lordships resorted to first principles and, by applying the principle in *Hadley v Baxendale* (1854) 9 Exch 341, [1843–60] All ER Rep 461, held that it had been within the reasonable contemplation of the bank at the date of the breach that Samson would lose future contracts with Economy Bag for a four-year period, as found by the trial judge. The only limitation on the recoverability of damages was their duration, and the judge had been correct in ruling that Economy Bag would ultimately have found a method of reducing Samson's profits and ultimately the relationship between them would have been terminated. However, in respect of that intervening four-year period, Samson was entitled to recover its projected loss.

[3.4] The duty of a bank to obey its customers' lawful instructions is subject to a major exception where the funds in question are suspected are

being the proceeds of crime or laundered. Section 328(1) of the Proceeds of Crime Act 2002 creates an offence where a person ‘becomes concerned in an arrangement which he knows or suspects facilitates ... the acquisition, retention, use or control of criminal property by or on behalf of another person’. Criminal property for this purpose (as defined in s 340(3)) is property which ‘(a) constitutes a person’s benefit from criminal conduct ... and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit’. In *Squirrell Ltd v National Westminster Bank plc (Customs and Excise Comrs intervening)* [2005] EWHC 664 (Ch), [2005] 2 All ER 784, [2005] 1 All ER (Comm) 749 Laddie J laid down guidelines to be observed by a bank in meeting its obligations under these provisions. The defendant bank had in the present case frozen the claimant’s account without notice and without providing any reasons. The claimant’s action to have the account unfrozen was dismissed, Laddie J holding that if a bank had a relevant suspicion it was obliged by s 328(1) to inform the relevant authorities of that suspicion and to maintain the freeze for seven working days (during which time the authorities were entitled to refuse consent to the transaction) and, in the event of consent being refused, for a further 31 days pending a decision. Laddie J also noted that s 338, which prohibited a person from making any disclosure likely to prejudice any investigation, entitled a bank to refuse to give details of the reasons for its conduct to the customer.

[3.5] In *Marconi Communications International Ltd v PT Pan Indonesia Bank Ltd TBK* [2005] EWCA Civ 422, [2005] 2 All ER (Comm) 325 the Court of Appeal held that, where a letter of credit has been confirmed by a bank, the law governing its obligation to pay the beneficiary is not dictated by the presumption in art 4(2) of the Rome Convention 1980 in favour of the confirming bank’s place of business. Instead, in determining the applicable law, it is necessary to look to the country with which the performance by the confirming bank of its obligations to the beneficiary has its closest connection (in accordance with art 4(5)). In the instant case the letter of credit had been opened in England, and the arrangements between the confirming bank in Indonesia and the beneficiary contemplated the presentation of documents, and payment in sterling, in London. All of this was sufficient to oust the presumption in favour of the law of Indonesia. (See also [5.22] below.)

Duty of care to third parties

[3.6] Last year’s Annual Review included detailed commentary on the decision of Colman J in *Customs and Excise Comrs v Barclays Bank plc* [2004] EWHC 122 (Comm), [2004] 2 All ER 789, [2004] 1 All ER (Comm) 960. The learned judge there ruled, on a preliminary issue involving assumed facts, that a bank which releases a customer’s funds in breach of a freezing injunction does not face liability in tort to the third party creditor who has obtained the order. Shortly after the Review had gone to press, the Court of Appeal reversed that ruling, although it was possible

only to note this development at proof stage. The Court of Appeal's decision is now reported ([2004] EWCA Civ 1555, [2005] 3 All ER 852). The assumed facts, repeated here for convenience, concerned two companies, Brightstar and Doveblue, each of which owed substantial sums of VAT to the Customs authorities. On 26 January 2001 Pitchford J granted a freezing injunction preventing Brightstar from dealing with, or removing from England and Wales, assets of up to £1.8m in an identified account held with the defendant bank. A copy of the order was served on the bank on 29 January 2001, and two days later the bank confirmed that it would abide by the terms of the order and sought reimbursement of its costs. Unfortunately, shortly after the letter was written but before it was received by the claimant, the bank by oversight released three payments totalling £1,240,570 from the account. The claimant sought to recover this sum from the bank once it had become clear that the debt would not be satisfied from Brightstar's own assets. In the Doveblue case a similar freezing order was made, on 30 January 2001 and in the sum of £3,928,130. Notice was served on the bank by fax at about 11.38 am that day. At about 2 pm on the same day the bank permitted payments out of the Doveblue account in the sum of £1,064,289. The bank wrote to the claimant the following day acknowledging the order but admitting that payments had been made in error out of the account. The claimant recovered what it could from Doveblue, but there was a shortfall of £130,630.81 which the claimant sought to recover from the bank. Colman J rejected the existence of a duty of care in the absence of any assumption of responsibility by the recipient of a freezing order. There had been no such assumption of responsibility in respect of Doveblue, although the position was more complex as regards Brightstar because the sums in question had been released before confirmation by the bank of its compliance with the freezing injunction. Colman J's view was that, in the absence of any requirement for the bank to acknowledge receipt of the order, its response could not be regarded as an assumption of responsibility so that the position was the same in both cases. The Court of Appeal reversed Colman J on the fundamental question of whether a duty of care should be imposed. Although there were different emphases in the judgments, the Court of Appeal was unanimous that the requirements of foreseeability and proximity were readily established and that the difficulty related to the third element of a duty of care, that of the fairness of its imposition. Here the Court of Appeal ruled that the service of a notice of a freezing order identifying the account to be frozen enabled the bank to comply with the order with relative ease, and in the absence of any policy consideration militating against the imposition of a duty of care such a duty should be imposed. The judgments contain detailed analysis of the correct approach to be adopted in considering whether a duty of care arose where the loss was purely economic, and there was much discussion of Colman J's assumption of responsibility analysis. Longmore LJ did not regard that test as appropriate and that it

would not have been satisfied on the facts, Lindsay J regarded it as useful and potentially decisive and Peter Gibson LJ contented himself with expressing the view that there was an assumption of responsibility on the facts. The wider issues arising from these judgments are considered elsewhere in this volume.

[3.7] In addition to a bank being found to owe duties of care to third parties, a bank is always open to an accusation of knowing assistance in breach of fiduciary duty where an account operated by the bank for a customer is used to expropriate funds from the customer's own principal. Comparable statutory liability may be imposed upon a bank under s 213 of the Insolvency Act 1986, which prohibits fraudulent trading and catches not just the fraudster but any persons knowingly parties to the business being carried on in a fraudulent manner. On the complex facts in *Re Bank of Credit and Commerce International SA (in liq)*, *Morris v Bank of India* [2004] EWHC 528 (Ch), [2005] 1 All ER (Comm) 209, [2004] 2 BCLC 279 Patten J was able to conclude that the defendant bank had, through the knowledge of its chief manager, the requisite knowledge that its assistance to its customer was furthering a fraud on third parties so that the bank was itself liable to contribute to the losses suffered by the victims of the fraud.

Other matters

[3.8] *Clayton's Case*, *Devaynes v Noble* (1816) 1 Mer 572, [1814–23] All ER Rep 1 has for some time been regarded as laying down a rule which is both capricious and arbitrary and which in practice will be disapplied whenever possible. The rule applies to current bank accounts and lays down a presumption that sums paid out of a bank account are to be attributed to sums first paid in. Accordingly, where a debtor pays sums owing to different creditors into the same indivisible account, and then withdraws a part of the total fund, the creditors do not share the remaining amount in proportion to what is owed to them but rather the payment out is set against the first payment in. There is no particular logic to the rule other than an assumed intention on the part of the debtor to have acted in that way. The most recent case to refuse to apply *Clayton's Case* is *Commerzbank Aktiengesellschaft v IMB Morgan plc* [2004] EWHC 2771 (Ch), [2005] 2 All ER (Comm) 564 (see also [21.32] below). The defendant, a stockbroker based in Nigeria, was the holder of two accounts in the London branch of the claimant bank. The funds in both accounts were obtained from clients and were mingled so that it was impossible to identify the source of any part of either account. The accounts were both frozen as a result of a police investigation, and the bank terminated its relationship with the defendant shortly afterwards. It became clear that some of the funds had been derived from fraudulent schemes of the type familiar to anyone with an email account. The bank undertook lengthy and detailed inquiries into the identities of possible claimants against the funds in the accounts, and subsequently commenced

the present interpleader proceedings so that the fate of the funds could be determined by the court. Needless to say, there was a significant shortfall between the claims of third parties and the amounts in the accounts (a shortfall of 54% on the sterling account and 91% on the dollar account). Lawrence Collins J, having held that the funds were held on trust and that the individual claimants had tracing claims, refused to apply the rule in *Clayton's Case*, because to apply it would be unjust and impractical, and concluded that – in the absence of any serious prospect of trying to allocate sums to individual claimants – the only fair way to share the balances in the accounts between the various claimants was on a proportional basis. The case is further confirmation of slow but sure demise of the rule in *Clayton's Case*.

[3.9] *Office of Fair Trading v Lloyds TSB Bank plc* [2004] EWHC 2600 (Comm), [2005] 1 All ER 843, [2005] 1 All ER (Comm) 354 is discussed at [6.2]–[6.9] below. The case revolved around s 75 of the Consumer Credit Act 1974, which gives the debtor under a restricted-use credit agreement a like claim against both the supplier of goods obtained on credit and the lender itself, in the event of defects in the goods. All that need be said here is that Gloster J ruled that: (a) the provision of a credit card constitutes a regulated restricted-use credit agreement for the purpose of s 11(1)(b) of the Consumer Credit Act 1974 irrespective of whether it is in the form of a three-party agreement (creditor, customer and supplier) or whether it also involves a merchant acquirer, so that s 75 is applicable; and (b) s 75 does not apply to a credit card purchase made and supplied outside the UK under a contract governed other than by English law.

[3.10] The Bills of Exchange Act 1882 rarely features in modern day litigation, although a complex point on the meaning of the Act arose in *Fiorentino Comm Guiseppe SrL v Farnesi* [2005] EWHC 160 (Ch), [2005] 2 All ER 737, [2005] 1 All ER (Comm) 575. In this case the defendants, directors of a company, Portofino, signed three post-dated cheques drawn on the company's NatWest account in favour of the claimant. The cheques omitted the word 'Ltd' from Portofino's name. The first cheque was presented for payment but was dishonoured. The second and third cheques were not presented for payment. Portofino was later wound up, and the claimant commenced proceedings against the directors personally under s 349(4) of the Companies Act 1985, which imposes personal liability on directors for a cheque signed by them but 'in which the company's name is not mentioned ... (unless it is duly paid by the company)'. Earlier authorities had established that a cheque was not 'duly paid' if it had been presented but dishonoured, and that was sufficient to render the directors personally liable for the first cheque. The dispute revolved around the second and third cheques, which had never been presented, and to succeed in respect of them it was necessary for the claimant to show that presentment of the cheques for payment had been dispensed with. This brought into play s 46 of the 1882 Act, which is

concerned with the effects of failure to present a bill for payment. Subsection (2) permits presentment to be dispensed with in certain circumstances, one of which, as set out in sub-s (3)(c), is as follows:

‘As regards the drawer, where the drawee ... is not bound as between himself and the drawer to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.’

The purpose of this provision is to remove the need for the presentation of a cheque for payment when it is clear that the cheque is going to be dishonoured. Translating this to the facts of the case, it was necessary for the claimant to show that: (a) NatWest as drawee was not bound to Portofino to honour the cheque; and (b) Portofino had no reason to believe at the relevant time that NatWest would pay if the cheque was presented. Condition (a) was found to have been satisfied on the facts, as Portofino's account was not in credit and NatWest had not bound itself to honour cheques which exceeded Portofino's overdraft limit. As to condition (b), a dispute arose as to timing. Nicholas Warren QC, sitting as a deputy High Court judge, held that s 46(2) focused on any time at which presentment could be made rather than the date of the cheque itself. The court was satisfied by the evidence that Portofino had no reason to believe from any time on or after which payment fell due that the cheques would be honoured, so that presentation had been dispensed with. In the event the timing issue was found to be immaterial, as the court was satisfied that Portofino could not have believed even from the earlier date of drawing the post-dated cheques that the cheques would be honoured when they fell due.

Competition

[3.11] It has long been the practice of certain ice cream manufacturers to supply, free of charge or at a nominal rent, freezer cabinets to retailers. Unsurprisingly, it is a condition of supply that the freezers are used exclusively for the manufacturer's own products. Competing manufacturers have raised objections to this practice, perhaps the most important being that a retailer is unlikely to have the space to display another freezer, so that the real effect of the agreements is to give rise to exclusive purchasing by the retailer. The practice has been challenged in a number of EU states, including Ireland and the UK, and has also given rise to proceedings by the European Commission under the competition rules in the EC Treaty following complaints by competing manufacturers. The Commission concluded in 1998 that the arrangements contravened the prohibition on restrictive agreements (art 81(1)) and did not qualify for exemption (under art 81(3)), and also contravened the prohibition on abuse of dominant position (art 82). That decision was challenged on both substantive and procedural grounds before the Court of First Instance in *Van den Bergh Foods Ltd v European Commission* Case T-65/98 [2005] All ER (EC) 418. In its lengthy judgment the CFI dismissed the

application. On the substance, the CFI ruled that many such agreements operated in the market and that the agreements entered into by the applicant in that context had an appreciable detrimental effect on competition contrary to art 81(1), even though the applicant's own market share was relatively small. The CFI confirmed that the Commission had been right to refuse individual exemption under art 81(3), as the agreements did not contribute to improving the production or distribution of goods: the failure of the agreements to satisfy this initial condition for exemption rendered it unnecessary for the CFI to consider whether the Commission had been correct to rule that the other conditions in art 81(3) had not been satisfied, as each of the conditions had to be satisfied before an agreement could qualify for individual exemption. As regards art 82, the CFI held that the Commission had correctly concluded that the applicant had a dominant position in the market and had abused that position by effectively foreclosing a substantial part of the market to other suppliers. Procedural objections based in particular on inadequacy of reasons were also rejected.

Insurance and reinsurance

Utmost good faith

[3.12] The decision of the Court of Appeal in *WISE Underwriting Agency Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] 2 All ER (Comm) 613, commented upon in last year's Annual Review, saw a recognition by a majority of the Court of Appeal, including Longmore LJ, that where the assured has failed to disclose material facts there is relatively little scope for an argument that the insurers are to be taken to have waived disclosure. One situation in which waiver is possible is where the insurers have, by their express questions, restricted the ambit of the information sought from the assured. This was the alternative ground for the decision of the Court of Appeal in *Doheny v New India Assurance Co Ltd* [2004] EWCA Civ 1705, [2005] 1 All ER (Comm) 382. The claimants, a married couple, completed two proposal forms – one in their personal capacities and one for their company – for insurance against property damage. The claimants signed a declaration stating that:

'No director/partner in the business, or any Company in which any director/partner have had an interest, has been declared bankrupt, been the subject of bankruptcy proceedings or made any arrangement with creditors.'

In fact the claimants had both been involved with companies which had gone into insolvent liquidation, but they signed the declaration and did not disclose these matters. The Court of Appeal held that the claimants' declaration, while technically correct in that the companies with which they had been associated had gone into liquidation and as a matter of law could have become bankrupt, was untrue. The Court of Appeal recognised that something had gone wrong with the wording of the

declaration but was satisfied that a reasonable person would have understood the question as referring to the general meaning of 'bankruptcy' – insolvency – rather than to its technical sense of a process capable of applying only to individuals. The matter having been resolved in favour of the insurers, it was unnecessary to decide whether, had the declaration been correct, the insurers were to be taken to have waived disclosure of corporate insolvencies by restricting their questioning to individual insolvencies. However, Longmore LJ tentatively expressed the view that, had the declaration been construed as confined to individual bankruptcies, there would have been waiver under s 18(3)(c) of the Marine Insurance Act 1906. It was the law that when specific questions were asked of the assured by proposal form, the insurers might be showing that they were not interested in certain other matters of which questions had not been asked. Whether or not there was waiver depended on a true construction of the proposal form, the test being: would a reasonable man reading the proposal form be justified in thinking that the insurer had restricted his right to receive all material information, and consented to the omission of the particular information in issue? Perhaps most significantly on this point, both Longmore LJ and Sir Christopher Staughton rejected the argument pressed by counsel for the insurers that the waiver principle was confined to 'consumer' insurances.

Claims

[3.13] 2005 was dominated by two crucial judgments of Mance LJ shortly before his elevation to the House of Lords, one relating to claims conditions and the other relating to fraudulent claims. It is apparent from these two judgments that an assured who has broken a claims condition is to be treated with the utmost leniency, whereas an assured who submits a fraudulent claim is not permitted to derive any benefit whatsoever from the policy. The former matter was addressed by the Court of Appeal in *Friends Provident Life and Pensions Ltd v Sirius International Insurance* [2005] EWCA Civ 601, [2005] 2 All ER (Comm) 145, on appeal from Moore-Bick J ([2004] EWHC 1799 (Comm), [2004] 2 All ER (Comm) 707), which was discussed in last year's Annual Review. The assured's liability claims made liability cover was arranged in two layers, the primary layer policy requiring the assured to give notice to the underwriters via the brokers of any claim as soon as possible and thereafter to give full details in writing to the underwriters. The former provision was expressed to be a condition precedent to the primary layer insurers' liability but the latter was not. The terms of the primary layer policy were incorporated into the excess layer cover. Claims were made against the assured in respect of pensions mis-selling, but notification was not given as such. Instead, on 28 January 1994, in the context of renewal negotiations, the assured wrote to the brokers and confirmed that it knew of no circumstances likely to give rise to a claim under the policy other than in respect of claims for pensions mis-selling. The primary layer

underwriters were content to treat this letter as notification, even though it was not designed as such. The excess layer underwriters nevertheless denied liability, and this led to a series of preliminary issues before Moore-Bick J. In summary, the learned judge held that: (1) the claims in principle fell within both the primary and excess layer policies; (2) the requirement for notice to be given to underwriters was satisfied for both the primary and excess layers if notice was given to the primary layer underwriters; (3) if it was the case that notice had to be given separately to the excess layer underwriters, then the letter of 28 January 1994 addressed to the brokers was not binding on those underwriters because they had not agreed to be bound by notification to brokers; (4) the letter was a valid notice even though it was sent for an entirely different purpose; (5) the claims obligations in the primary layer policy were incorporated into the excess layer policy; (6) the further obligations in the notice provision which were not expressed to be conditions precedent were innominate terms with the effect that if the breaches were sufficiently serious the excess layer underwriters would be discharged from liability for the claim by reason of repudiation of the claim; and (7) if there was a serious breach leading to repudiation of the claim, the claim would be lost without any need for the excess layer underwriters to communicate their 'acceptance' of the repudiation. On appeal issues (1) and (5) did not arise, and the Court of Appeal upheld Moore-Bick J's view on issue (2) that there had been valid notification of the claims to the excess layer underwriters, so that issue (3) fell away. The Court of Appeal also agreed with Moore-Bick J on issue (4): the letter could be regarded as fulfilling two separate purposes and thus constituted a valid notification of claims.

[3.14] The outstanding issues related to the effects of a breach of those aspects of the claims provision not expressed to be conditions precedent. It is generally accepted that a claims clause is, in general contractual parlance, innominate, in that such a clause cannot from the outset be classified as fundamental or ancillary. Accordingly, the consequences of breach depend upon the seriousness of the breach. In the ordinary law the question to be asked is whether the breach of the innominate term is so serious as to amount to a repudiation of the contract as a whole (in which case the innocent party may terminate the contract as of the date of the breach) or whether it is relatively trivial (in which case the innocent party may only pursue damages). This analysis is highly unfavourable to insurers. It is all but inconceivable that failure to comply with a claims provision can amount to a repudiation of the entire policy: this means that, no matter how serious and deliberate the breach of the term, insurers must pay and are confined to seeking damages from the assured for any loss which they can prove to have suffered by reason of the breach. This apparent unfairness led Waller LJ to suggest, obiter, in *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2000] 1 All ER (Comm) 545, that there was an intermediate possibility, namely that the assured's breach was such as to amount to a repudiation of the claim: on this

analysis the policy would be unaffected, but the insurers would have the right to refuse to pay a claim if they were seriously prejudiced by the assured's breach. This suggestion was cited with apparent approval in a series of subsequent cases, and was actually applied in *Bankers Insurance Co v South* [2003] EWHC 380 (QB), [2003] All ER (D) 85 (Mar) to deprive the assured of a claim for serious breach of a claims notification provision not expressed to be a condition precedent. At first instance in *Sirius*, Moore-Bick J accepted the correctness of Waller LJ's principle. On appeal in *Sirius*, Mance LJ and Sir William Aldous denied that any such principle existed. Mance LJ, addressing the issue in detail, noted that there was no authority prior to *Alfred McAlpine* for the concept of repudiation of a claim, and that there was no equivalent recognition elsewhere in English contract law of the notion of partial repudiation of a contract. The apparent unfairness to the insurers was dismissed by Mance LJ on the grounds that it was always open to them to make compliance a condition precedent, and that the principle also operated unfairly on an assured where, for example, a breach of a claims condition prejudiced a possible subrogation claim by the insurers but nevertheless allowed the insurers to repudiate the assured's own claim which could be for a substantially greater sum. Waller LJ, dissenting, adhered to his position in *Alfred McAlpine*. The consequence of the majority comments is that a claims clause will inevitably be classified as innominate and that its breach is almost certain not to be a repudiation of the policy as a whole (although Waller LJ contemplated the possibility of repudiation where there had been a series of related breaches) and gives rise only to damages. Mance LJ recognised that the insurers' prospects of proving loss are not good, and Waller LJ described the remedy as 'illusory'. In short, therefore, a claims condition which is not a condition precedent is likely to be of no assistance to insurers.

[3.15] It might be added that in *Ronson International Ltd v Patrick (Royal London Mutual Insurance Society Ltd, Pt 20 defendant)* [2005] EWHC 1767 (QB), [2005] 2 All ER (Comm) 453, his Honour Judge Richard Seymour QC chose to follow the majority view in *Friends Provident*, and rejected the concept of repudiation of the claim. In the event the point did not arise on the facts. D, at the time aged 11, deliberately started a small fire, which rapidly got out of control and destroyed a mill containing industrial units. A claim was made against D by the owner of goods on the premises at the time. D's mother had a home insurance policy which also included liability cover. The policy excluded the insurers' liability in the event of loss caused by 'any wilful, malicious or criminal acts'. The policy also contained a notification clause under which the assured was required to inform the insurers in writing immediately on becoming aware of any incident for which she might be held responsible. The insurers relied upon the exclusion and also upon lack of notification. The court ruled that both defences failed. As to the coverage, the word 'wilful' was to be read in context, and the context

demanded damage deliberately caused, consciously intended. While the fire was a wilful act, the damage caused by it was not intended. As to notification, there was no breach of the clause: the only claims which had to be notified were those against the assured herself; the obligation was not to notify the fire as an event, but rather to notify the fact that a claim had been made against D, and this had been done. Even if that was wrong, the clause was not a condition precedent and accordingly did not give an automatic defence. Following *Sirius International Insurance v Friends Provident Life & Pensions Ltd*, the only question was whether the assured had, by making a late claim, repudiated the policy as a whole: it was no longer possible to argue, following the rejection by *Sirius* of the reasoning in *Alfred McAlpine*, that insurers could escape liability by showing that the breach of the condition had caused them serious prejudice.

[3.16] The principles governing fraudulent claims are slowly being clarified, and are quite different from those applicable to other claims conditions. The judgment of Mance LJ in Court of Appeal in *Agapitos v Agnew* [2002] EWCA Civ 247, [2002] 1 All ER (Comm) 714, discussed in the 2002 Annual Review, was a landmark in two respects: it disentangled fraudulent claims from the ever-shrinking concept of a continuing duty of utmost good faith; and it identified the types of conduct which rendered a claim fraudulent. The effect of *Agapitos* is that a fraudulent claim does not permit the insurers to treat the policy as avoided ab initio, although it does permit them to refuse to pay a claim tainted by fraud (which is of course the partial repudiation approach rejected as regards other claims provisions in *Friends Provident*). The point left undecided in *Agapitos* is whether insurers can treat a fraudulent claim as a repudiation of the policy itself, thereby allowing the insurers to deny not just the fraudulent claim but also all claims which arise after the loss giving rise to the fraudulent claim. The Court of Appeal refused to be drawn on the point in *Axa General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112, [2005] 1 All ER (Comm) 445. Here, the assured suffered four separate losses in the policy year beginning August 1993, and payment was made by the insurers. In 1999, long after the expiry of the policy, the assured submitted claims for additional sums in respect of the first two losses, and these were paid. The insurers subsequently discovered that the additional claims were in fact fraudulent, and sought repayment both of the additional sums and also all of the sums earlier paid in respect of the four claims. The Court of Appeal found for the insurers in respect of the first two claims but not in respect of the two later claims. As to the first two claims, which were tainted by fraud, the Court of Appeal confirmed the principle that if any significant part of a claim was fraudulent then the entire claim was undermined. On that basis, the entire sum paid in respect of the fraudulent claims was recoverable. In so deciding the Court of Appeal held that sums paid by to the assured in respect of these claims before the fraud had occurred were themselves recoverable. The rule was that the

insurers' liability arose as soon as the loss occurred, and the effect of a fraudulent claim was retrospectively to remove the assured's cause of action from the date of the occurrence of the insured peril. The Court of Appeal noted that if a later fraud tainted a claim in respect of a genuine loss, the entire claim was forfeited. It made no difference that payment had been made before the fraud was committed. As to the claims not tainted by fraud, the Court of Appeal held that the insurers were unable to recover the sums paid. The effect of fraud was not to cause the policy to be avoided *ab initio*, and this meant that the claims were unaffected by the fraud. The Court of Appeal noted that, had the claim for restitution been made before the expiry of the August 1993 policy, the question whether the fraudulent claim had repudiated the entire policy and thus removed the basis for the later claims, would have been a live one. However, that policy had come to an end in August 1994, and it was too late for the insurers to assert any right to treat it as repudiated. Accordingly, the Court of Appeal was not called upon to decide whether the insurers would have been liable to pay valid claims made after a claim which was subsequently tainted by fraud, ie the question whether the effect of fraud is a repudiation of the claim or a repudiation of the policy. In this regard Mance LJ noted that was some force in the argument that the common law rule relating to fraudulent claims should be confined to the particular claim to which any fraud related.

Conflict of laws

[3.17] Article 23 of Council Regulation (EC) 44/2001 requires the courts of EU member states to give effect to any jurisdiction agreement which is either in writing, in a form which accords with the parties' practices or accords with a usage in international trade or commerce with which the parties are or ought to have been aware. In *Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd v GIE Vision Bail* [2004] EWHC 2919 (Comm), [2005] 1 All ER (Comm) 618 a P&I club sought to recover unpaid calls from LDFS, a Cypriot company which had been made a co-assured under a policy taken out by Festival, a member of the club. LDFS employed the staff who operated the shops on board Festival's cruise ships, and the insurance covered LDFS against employer's liability risks. The club's rules contained an exclusive jurisdiction clause nominating the English courts as regards disputes between the club and its members. LDFS denied that the clause was binding on it, on three separate grounds: LDFS was not a member of the club for the purpose of the clause; the requirements of art 23 had not been met; and even if that was wrong then the special jurisdiction rules for matters relating to insurance, in arts 12–14 of the Regulation, prevented an assured from being sued anywhere other than in the place of its domicile and this right could not be lost by agreement other than in the case of marine policies. Colman J rejected each of these contentions. On the construction issue, LDFS was, as a matter of construction of the

club's rules, bound by the jurisdiction clause: under the rules, LDFS was deemed to be a 'member' within the terms of the clause. Secondly, the exclusive jurisdiction clause satisfied the terms of art 23. It was sufficient for the parties expressly to refer in the contract to some other document in writing in which reference was made to general conditions including a jurisdiction clause. That point aside, the alternative criteria in art 23 were satisfied. Further, each of the alternative conditions for the making of a binding agreement in art 23.1 were met: the form of the agreement was one which accorded with the practices established by the parties; and the contract was one recognised in international trade or commerce, and was in form which accorded with usage which the parties were or ought to have been aware and which widely known and regularly observed in the insurance trade. The fact that the agreement had been entered into by agents for LDFS and for the club did not preclude the operation of art 23. Finally, the insurance rules were inapplicable. While it was the case that art 12 required the assured to be sued in the place of its domicile, art 13 permitted contracting out where the agreement fell within art 14. That latter article extended, *inter alia*, to marine policies, and in the present case although the risks were primarily employers' liability risks they arose in a maritime context. Further, the cover issued to Festival as a whole – and LDFS was only a small part of this – was primarily marine and thus within art 14.

[3.18] The special insurance rules in Regulation 44/2001 were again under consideration, by the European Court of Justice in *Société Financière et Industrielle du Peloux v Axa Belgium* Case C-112/03 [2005] 2 All ER (Comm) 419. As noted above, the basic principle is that an exclusive jurisdiction clause is void unless it falls within one of the exceptions in art 14. One such exception applies to an agreement –

'which is concluded between a policy-holder and an insurer, both of whom are domiciled in the same Contracting State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State.'

The European Court of Justice held in the present case that this exclusion is to be narrowly construed and applies only an agreement between the assured and the insurers, and is not binding on a third party beneficiary under the policy who is not domiciled in that jurisdiction. The insurance in this case was taken out by a Belgian company on behalf of itself and its subsidiaries, and provided for the exclusive jurisdiction of the Belgian courts. The European Court of Justice held that the clause, while binding on the Belgian parent company, was ineffective as against the assured's French subsidiary, the latter being entitled to bring an action in France in line with the special insurance rules in the Regulation.

[3.19] The use by insurers and reinsurers of proceedings in the English courts for negative declaratory relief has in recent years become

commonplace, and indeed the majority of cases coming before the English courts involving English policies issued to overseas policyholders are of this type. It is now settled law that the English courts will grant a declaration if it would serve a useful purpose in resolving the dispute between the parties: there is indeed little point in complex factual issues being litigated abroad if, at the end of the day, the matter will turn upon whether the policy is voidable or does not cover the peril in question. It nevertheless remains incumbent on the underwriters to prove that England is the most appropriate place for the action to be heard. That is most likely to be the case if the underwriters' defence relates to a matter of English law but, as is demonstrated by *Limit (No 3) Ltd v PDV Insurance Co Ltd* [2005] EWCA Civ 383, [2005] 2 All ER (Comm) 347, not if the dispute concerns an underlying issue unconnected with England. In *Limit*, PDVSA, the Venezuelan state oil company, was insured against third party liabilities by a local insurer, Mercantil. Mercantil reinsured with PDVIC, a captive company of PDVSA, and PDVIC in turn retroceded its liabilities in the London market with the claimants under agreements governed by English law. During the period of coverage a pipeline fractured in the Rio Guanipa area, resulting in widespread oil pollution. Subsequently, there was a further leak from the pipeline in August 2001 at Campo Limon, with similar although less extensive effects. PDVSA was faced with claims by local farmers, and also liability for clean-up costs. Before any claim had been made against Mercantil, the claimants sought negative declaratory relief against PDVIC in the English courts. The grounds of relief were that any claim that PDVSA had against Mercantil was bound to fail and, accordingly, there could never be any liability passed along the reinsurance chain to the claimants. The grounds upon which PDVSA's claim was doomed to failure were alleged to be: the expiry of the Venezuelan limitation period for the making of insurance claims; breach by PDVSA of claims conditions; and the absence of any legal liability to local farmers under Venezuelan law. The claimants also relied upon an exclusion in their policy for the consequences of a 'sudden, unintended and unexpected happening'. The Court of Appeal held that England was not the most appropriate forum for the hearing of the claim. The first three defences all involved questions of Venezuelan law and all of the relevant evidence was to be found in Venezuela. The only issue of English law was the interpretation of the exclusion clause, but this was a relatively straightforward matter which could be resolved in Venezuela and there was no merit in two separate sets of proceedings. The Court of Appeal emphasised that the proceedings were largely speculative, in that there had been no claim in Venezuela and the issues likely to arise there could only be guessed at. Although the point was not put in quite these terms, the Court of Appeal plainly felt that this was not an appropriate action for negative relief.

[3.20] *Konkola Copper Mines plc v Coromin* [2005] EWHC 898 (Comm), [2005] 2 All ER (Comm) 637 is of general significance to the enforceability of exclusive jurisdiction clauses and it suffices here to say that Colman J ruled that the decision of the European Court of Justice in *Owusu v Jackson* (*t/a Villa Holidays Bal-Inn Villas*) Case C-281/02 [2005] 2 All ER (Comm) 577 – holding that where the defendant is domiciled in England the English court has no power to stay its proceedings on the grounds of forum non conveniens irrespective of whether the parallel action is to take place inside or outside the EU – does not apply where the contract contains an exclusive jurisdiction clause. The claimants in this case were insured under a local Zambian policy issued by Zambian insurers, and also by a global all risks policy issued by Coromin to KCM's parent company. The Zambian policy provided for disputes to be resolved by the Zambian courts (a clause held by Colman J to be exclusive) and Coromin's global policy provided for exclusive English jurisdiction. Coromin was reinsured by London market reinsurers. The mine suffered a loss by reason of an avalanche. KCM commenced proceedings against the Zambian insurers in Zambia, and against Coromin in England. Coromin sought to join the reinsurers to the English proceedings. The reinsurers resisted joinder, arguing that Coromin was in fact the reinsurer of the Zambian insurers and that the reinsurance of Coromin itself incorporated the Zambian exclusive jurisdiction clause. Colman J refused to stay the English proceedings. In his view the reinsurance did not incorporate the Zambian clause but rather incorporated the English jurisdiction clause from the global policy. That was determinative of the reinsurers' stay application. However, Colman J held that even if he had been wrong on the point it would not have been appropriate to stay the English proceedings and that this was a case in which the court would have been justified in overriding any clause providing for any exclusive jurisdiction clause nominating Zambia: it was in the interests of justice to have all matters between KCM, Coromin and the reinsurers resolved in England, particularly because the reinsurers wished to join the brokers to the proceedings. Colman J finally ruled that, had he decided that it was appropriate to stay the English proceedings, he would have had the jurisdiction to do so despite the ruling by the ECJ in *Owusu v Jackson*. Colman J was firmly of the view that *Owusu* had no application to the case in which the agreement contained an exclusive jurisdiction clause. While it was the case that under *Owusu* the domicile of the defendant was the determining factor, the scheme of Regulation 44/2001 itself gave priority to exclusive jurisdiction clauses. Article 23 of the Regulation conferred exclusive jurisdiction only upon the courts of a contracting state nominated by an exclusive jurisdiction clause, leaving clauses nominating non-contracting states to be governed by the conflicts rules of the forum, there was nothing in the Regulation to suggest that domestic conflicts rules were to be subjected to the *Owusu* principle. Accordingly, it remained the case that the English court could stay

proceedings brought against a defendant domiciled in England in the event that there was an exclusive jurisdiction clause nominating some other jurisdiction whether inside or outside the EU. Colman J's decision to stay the proceedings was subsequently upheld by the Court of Appeal, [2006] EWCA Civ 5, [2006] All ER (D) 83 (Jan), although there was no discussion of the *Owusu* point.

Intermediaries

[3.21] Of the many curious rules which pervade insurance law, perhaps the most anomalous relate to brokers. There is a marine insurance rule of long standing, codified in s 53(1) of the Marine Insurance Act 1906, to the effect that the broker pays the premium to the insurers and seeks reimbursement from the assured. This rule was considered by the Court of Appeal in *Heath Lambert Ltd v Sociedad de Corretaje de Seguros* [2004] EWCA Civ 792, [2005] 1 All ER 225, [2004] 2 All ER (Comm) 656, and it was held that the limitation period for a claim by the paying broker for indemnification arises on the date on which payment was due under the policy: thus, where the policy gave the assured a period of credit for payment of the premium, the broker's cause of action accrued on the date of the expiry of that credit period

[3.22] The principle that the broker is the agent of the assured and not the agent of the underwriters is one that for the most part holds good but there are practical situations in which brokers clearly act either for underwriters or possibly as agents common to both parties. Market practice necessarily gives way to legal principle should the two conflict, and underwriters received something of a shock in *Goshawk Dedicated Ltd v Tyser & Co Ltd* [2005] EWHC 461 (Comm), [2005] 2 All ER (Comm) 115 when it became clear to them that the practice of using brokers as repositories for documents is inconsistent with the primary duty of brokers to assureds. The claimant Lloyd's syndicates issued insurance to 'viatical' companies, which purchased at a discount life policies of persons aged over 65 or suffering from terminal illness. The insurance protected the companies against the risk of the purchase price and the premiums exceeding the amount recoverable under the policies. The policies were placed by the defendant brokers either directly or via an underwriting agent. The syndicates and the brokers entered into a Terms of Business Agreement (TOBA) in 2001. Under this agreement the syndicates had the right to inspect and copy documents, although the agreement went on to provide that 'Nothing in this Agreement overrides the Broker's duty to place the interests of its client before all other considerations'. The syndicates sought disclosure of placing documents, claims documents and premium accounting documents: these were provided where the assured consented, but not otherwise. A disclosure order was sought from Christopher Clarke J. The court refused the applications. As regards the position before TOBA, there was no evidence to support an implied term based on market practice and custom whereby

brokers would allow underwriters access to information on their placing and claims files. Further, there was no contract as such between them, and even if there was evidence of a custom the court would have regarded it as unreasonable given that it placed the broker in a position of conflict of interest. The alternative argument, that underwriters could be regarded as beneficial owners in equity of the information, was also rejected. After TOBA, the position was that the broker's obligations to his client overrode the syndicates' rights of inspection. It is of interest to note that the documents of which the syndicates sought possession or sight were documents which had been seen by them before: the case really turned on whether underwriters could take advantage of their own conduct in not keeping copies of documents shown to them, the answer being firmly in the negative. Separate arguments were raised in respect of the premium accounting documents. The court rejected the suggestion that the marine insurance rule whereby the broker is liable for the premium did not apply to the non-marine market, but held that the syndicates were under the express terms of TOBA entitled to see various accounting records (for example, bank statements from brokers evidencing receipt of premium), and there was no danger of any conflict of interest if brokers were required to produce such documents. The Court of Appeal subsequently reversed this ruling, [2006] EWCA Civ 54, [2006] All ER (D) 74 (Feb), although the argument accepted on appeal was not one that had been put to the trial judge, namely that it was an implied term in a contract of insurance made at Lloyd's that the assured authorised his brokers to make claims, placing and accounting documents available to underwriters, and there was a further implied contract between brokers and underwriters that the brokers would supply the documents in accordance with the assured's contractual obligation.

Liability insurance

[3.23] The phrase 'Lumberman's Compliant' is one which has become all too familiar in the liability insurance market as a consequence of the decision of Colman J in *Lumbermen's Mutual Casualty Co v Bovis Lend Lease Ltd* [2004] EWHC 2197 (Comm), [2005] 2 All ER (Comm) 669. Bovis was insured against its liability under a construction professional liability policy and an excess layer policy. Bovis was employed by Braehead to build a leisure centre in Glasgow, and warranted that goods and workmanship would be sound and of a satisfactory quality. Disputes arose and Bovis claimed some £49,524,189 from Braehead. In turn Braehead made a counterclaim against Bovis, for £103,594,367 or alternatively for £75,770,225. The parties ultimately entered into a settlement agreement under which Braehead agreed to pay Bovis a global sum of £15m in full and final settlement of all disputes under the building contract. The method of calculation of that global sum was not identified in the agreement, and in particular it was not clear whether Bovis' potential liability to Braehead had been taken into account on the basis

that Braehead had a valid claim and that certain of the claims against Bovis were uninsured. Bovis sought to recover this sum from its insurers, and this gave rise to a number of preliminary issues. As far as coverage was concerned, Colman J held that the insuring words which provided indemnity for liability incurred by the 'as a result of any neglect error or omission' were not confined to pure negligence claims, but also extended to non-negligent conduct which gave rise to liability and to contract claims in respect of which there was parallel liability in tort. Of wider significance, however, was Colman J's ruling that Bovis could not seek to establish the liability of the insurers by reliance on a settlement which did not allocate the sums payable under the settlement as between the various claims against Bovis. The significance of this point relates to the rule that the assured under a liability policy is able to recover from insurers if his liability to the third party is established and quantified. A judgment or arbitration award against the assured will in all but exceptional cases satisfy these requirements, but in the case of a settlement between the assured and the claimant (and absent any follow the settlements or equivalent provision in the policy), the assured must go on to show that, had he been sued to judgment, he would have been liable for at least the amount of the settlement. The settlement is thus a prerequisite to a claim against the insurers. However, Colman J ruled that by failing in the settlement to allocate losses to claims, there was no settlement which Bovis could use as a trigger for a claim against the insurers, so that Bovis did not even get the opportunity to demonstrate that as a matter of law it had faced liability to Braehead. This decision has been the subject of much criticism in the legal profession, on the basis that settlements in practice do not allocate payments as between various claims and indeed the usual obligation of the assured under a liability policy not to admit liability itself militates against such allocation. To be 'Lumberman's Compliant', a global settlement of a series of claims must, therefore, identify the various claims against the assured and allocate sums to each of them: only after this has been done can the assured present the settlement to the insurers and seek to demonstrate that there was liability and that the amount of that liability did not exceed policy limits. In a recent decision, *Enterprise Oil Ltd v Strand Insurance Co Ltd* [2006] EWHC 58 (Comm), [2006] All ER (D) 185 (Jan), Aikens J has refused to follow *Lumbermen's* and has held that a settlement which does not allocate sums to individual claims is one which can be used by the assured as the basis for an action under a liability policy.

[3.24] Product liability policies have been considered in a series of cases in the past five or so years. One of the common themes emerging from the decisions is the notion that a policy – unless extended by special wording – applies only to external damage inflicted by the product supplied, and does not cover the cost of putting right the defects in the supplied product itself. This more or less reflects the common law rule relating to tort liability for the supply of defective products. In *Pilkington UK Ltd v CGU*

Insurance plc [2004] EWCA Civ 23, [2005] 2 All ER 283, [2005] 1 All ER (Comm) 283 the assured supplied some 3,000 heat-soaked toughened glass panels to a contractor employed to build the roof on the Eurostar terminal at Waterloo Station. After installation about 13 of the panels were found to have fractured. Nobody was injured and the roof itself was undamaged: the only problem was the fracturing of the glass itself. Eurostar was nevertheless concerned that injuries might be caused by falling glass, and chose to close the terminal for a short period pending investigation. Ultimately, the fractured panels were removed and additional safety measures were taken to ensure that any future fractures did not result in falling glass. Eurostar commenced proceedings against the contractors, who in turn joined the assured on the basis that the assured was liable either to indemnify the contractor or at least to contribute to any sum awarded to Eurostar. At that point the assured sought a declaration to the effect that its liability insurers would be liable to indemnify the assured for such damages if they were awarded. The policy covered liability for the occurrence of 'loss of or physical damage to physical property not belonging to [the assured] ... caused by any commodity article or thing supplied installed erected repaired altered or treated by [the assured]'. The policy also contained a Notice of Claims condition which various claims obligations on the assured: the condition was not itself stated to be a condition precedent, but there was a general 'Observance of Conditions' clause which provided that 'The due observance and fulfilment of the terms and provisions and conditions insofar as they relate to anything to be done or complied with by the Insured ... shall be conditions precedent to any liability of the Company'. The insurers contested the declaration on two grounds: that the policy did not respond to the loss; and that the assured had been dilatory in notifying the insurers of the claims, contrary to the claims provisions. The Court of Appeal held that the insurers succeeded on both points. As to coverage, the Court of Appeal ruled that a products liability policy responded only where the assured could demonstrate some physical damage caused by the product, and for that purpose a defect or deterioration in the product itself did not suffice. Further, the installation of a defective product into a building or some other product was not an 'occurrence', as the installation taken alone did not cause any damage to that other product. The costs of preventing future loss were irrecoverable, given the absence of any general suing and labouring duty in English law. As far as the claims condition was concerned, the Court of Appeal held that the policy rendered compliance a condition precedent, so that breach meant that the claim was automatically lost.

[3.25] The Third Parties (Rights against Insurers) Act 1930 has been awaiting reform since the publication of detailed Law Commission proposals now some five years ago. Pending the implementation of that report, the courts have continued to struggle with old wording in a modern context. *Centre Reinsurance International Co v Freakley* [2005]

[2005] EWCA Civ 115, [2005] 1 All ER (Comm) 65, an appeal from the decision of Blackburne J ([2004] EWHC 200 (Ch), [2004] 2 All ER (Comm) 28), raised a number of important questions on the interpretation of the legislation. This case was concerned with the resolution of various preliminary issues on the Act following the insolvency and administration of T&N in the face of massive asbestos liability claims against it. T&N was insured against liability by a policy underwritten by its captive, Curzon. The policy covered T&N for its liability for asbestos claims in excess of £690m, up to a limit of £500m and also contained a claims control provision, which provided that in the event of an insolvency event or the loss reaching the retained level, Curzon was to have 'the full, exclusive and absolute authority, discretion and control ... of the administration, defence and disposition ... of all Asbestos Claims ...' Curzon had in turn reinsured its liability under an agreement which contained a similar claims control transfer, so that once claims control was vested in Curzon the reinsurers were themselves entitled to take over the control of any claim by a third party against T&N. The preliminary issues were largely concerned with the control of third party claims: T&N's administrators asserted that the claims control provision in the insurance was void under the 1930 Act, so that control rested with the administrators; the reinsurers wished to demonstrate the validity of the claims control clause so that control was delegated to them. The dispute turned on s 1(3) of the 1930 Act, which is in the following terms:

'In so far as any contract of insurance ... in respect of any liability of the insured to third parties purports, whether directly or indirectly, to avoid the contract or to alter the rights of the parties thereunder upon the happening to the insured of any of ... [insolvency event] ..., the contract shall be of no effect.'

The Court of Appeal, upholding the bulk of Blackburne J's judgment, held that the claims control clause was valid. The initial question was whether the deductible – postponing the triggering of the Curzon policy until T&N's losses reached £690m – meant that the 1930 Act could not apply until losses reached that amount: if that was the case then s 1(3) could not operate to strike down the claims control clause until that stage had been reached. Here, Blackburne J had held that the effect of the assured's insolvency was to confer contingent rights against the insurers upon third party claimants, so that terms which offended s 1(3) were avoided from the outset. At first instance Blackburne J accepted the reinsurers' argument that the claims control clause in the policy issued by Curzon was binding as the clause did not operate to effect a variation of T&N's rights on its insolvency: it remained the case that there was a claim against the insurers; claims handling rights were not referable to the liability of T&N to the third party; s 1(3) did not prevent a variation of policy terms following insolvency, but only a reduction in the ability of the third party to make a claim; and it could not be said that the third

party's ability to claim had in any way been impaired. The Court of Appeal held that Blackburne J was plainly right in his ruling on this point: there was no reason to think that it would make any material difference to the third party whether claims were handled by T&N or by its insurers (or reinsurers). The Court of Appeal went on to affirm Blackburne J's ruling that the costs and expenses incurred and paid by the reinsurers in the exercise of claims handling rights were to be taken into account as part of the overall indemnity and thus were to be deducted from the insured sum rather than additional to it, although it disagreed with the learned judge on the effect of the insolvency legislation and held that claims handling expenses, properly incurred, were necessary to the carrying out of the administration order, as they would have been incurred whether the claims handling had been done by the reinsurers or by the administrators, and thus were to be paid as an expense of the administration under s 19(4) of the Insolvency Act 1986. One further point may be noted. It was common ground that the 1930 Act did not remove the liability of the assured to the third party. However, Chadwick LJ held that the effect of s 1(4)(b) of the 1930 Act was to preclude any action by the third party against the assured in respect of the insured sum. Arden LJ disagreed, and held that if, for example, the insurers became insolvent the third party's right to sue the assured would remain intact. The latter view would seem to be preferable for the reasons given by Arden LJ.

Property insurance

[3.26] The policy in *Canelhas Comercio Importacao e Exportacao Ltd v Wooldridge* (as representative of Lloyd's Property Consortium Syndicate 9091) [2004] EWCA Civ 984, [2005] 1 All ER (Comm) 43 covered a wholesale jeweller in Sao Paulo against all risks up to the sum of US\$3m. Cover was nevertheless effectively removed for loss of or damage to property by robbery when the premises were open for business or when the assured or any of their employees were present. The assured's loss occurred when his family was kidnapped and he was instructed by the kidnappers to remove all of the emeralds from his premises. The assured did so during working hours. The Court of Appeal held that the claim against the insurers succeeded. Robbery required the use of threats or violence, and the restriction on cover, properly construed, applied to the situation in which those threats occurred at the assured's premises and not somewhere remote and unconnected with the premises. The Court of Appeal also commented that in a case involving the issue of an English law policy to a foreign assured it was appropriate to construe the policy as it would be understood by an ordinary commercial person and not in any technical English sense.

[3.27] It is settled law that a fundamental change to the risk operates to discharge insurers automatically from any future liability under the policy. It is also settled law that, absent policy provisions to the contrary, once

the risk has commenced then its subsequent termination does not entitle the assured to any pro rata return of premium: the premium is indivisible and, in the absence of total failure of consideration (as in an avoidance), there is no basis for restitution. These rules were applied by Morison J in *Swiss Reinsurance Co v United India Insurance Co Ltd* [2005] EWHC 237 (Comm), [2005] 2 All ER (Comm) 367. The assured, a joint venture, commissioned the construction of a power plant. The assured was insured under an all risks construction policy which covered physical damage arising during the construction period of 44 months and losses arising from defects during a subsequent maintenance period of 24 months following completion of the project. The premium was to be assessed during the currency of the policy, although a minimum figure was agreed and a deposit premium was paid. The cover was reinsured on the same terms. Condition 12 of the policy provided that, in the event that work stopped, the policy was to continue for a maximum of six months without additional premium. One of the members of the joint venture defaulted on its agreement to purchase electricity generated by the plant, with the result that the assured ran out of funds to complete the work. The contractors, who were unpaid, walked off the site. Condition 12 was applied and the policy was maintained in force for a further six months. On the expiry of that period the cover was not renewed. Two issues arose. The first was whether the policy had been validly terminated at the end of the six-month period. Morison J held that this was the case. The abandonment of the project amounted to a material change in the risk and, but for condition 12, would have automatically discharged the cover. The site had been converted from an active building site into a warehouse for equipment and installations. Instead of there being building risks, the risks had become fire, deterioration owing to climate, and damage due to inclement weather. Condition 12 did not affect the position, as it was designed to ensure that cover would be maintained for six months, giving time for work to recommence. On the expiry of that period the policy came to an end: it did not continue for the unexpired period of 44 months. The second question was whether the reinsured was entitled to a return of that proportion of the premium which represented the cover for the maintenance period, as that period had never commenced. That argument could only succeed if there was separate premium for the construction risk and for the maintenance period. Morison J denied that this was the case and held that the premium was a global one covering all of the parts of the policy which could not be split into its separate parts. While it may have been the case that particular risks had been rated separately this did not mean that the risks were separable, and in particular the fact that there had been an aggregate discount on the premium made the case for severability more difficult to sustain. Given that the premium was not severable, there was no failure of consideration and no part of the premium was recoverable. That reasoning aside, Morison J found that the claim would have failed on the facts as it

appeared that some part of the maintenance period had commenced by reason of certain subcontractors having completed their work.

Reinsurance

[3.28] *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2005] 1 All ER 191, [2005] 1 All ER (Comm) 117 raised a short point on the proper construction of a Tomlin order, although the case has wider implications for the approach to be adopted to the construction of commercial contracts. Sirius, acting as a 100% fronting company for FAI, provided reinsurance to a Lloyd's syndicate. The back-to-back retrocession arrangements between FAI and Sirius required FAI to obtain a letter of credit from a bank in favour of Sirius, to guarantee the indemnification of Sirius in the event of claims against it. The letter of credit was duly provided by Westpac, and a side agreement between FAI and Sirius stated that Sirius would not draw down on the letter of credit 'unless [FAI] has agreed that [Sirius] should pay a claim but has not put [Sirius] in funds to do so'. Claims were made by the Lloyd's syndicate against Sirius, in respect of which Sirius sought indemnification from FAI. A dispute arose and arbitration proceedings were commenced. At that point FAI went into provisional liquidation and the proceedings were stayed. A settlement was ultimately reached, and was put into the form of a Tomlin order. Under the settlement FAI acknowledged that it was indebted to Sirius in the sum of \$22,500,000 and that Sirius could prove in FAI's liquidation for that sum. The Tomlin order further provided that: 'For the avoidance of doubt, the position and all arguments of [Sirius] and [FAI] in respect of the [Letter of Credit] are preserved in respect of the proceeds notwithstanding the terms of this Schedule.' The sums payable by Westpac under the letter of credit were placed in escrow, and each of the parties claimed ownership of those sums. The Court of Appeal ([2004] 1 All ER 308) found in favour of FAI on the ground that the Tomlin order did not amount to an agreement by FAI that it would pay Sirius, as required by the side letter, and accordingly Sirius was not entitled to draw down on the letter of credit. The House of Lords unanimously (despite reservations being expressed by Lords Bingham and Brown) overturned the decision of the Court of Appeal and held that Sirius was entitled to the sum in escrow. Lord Steyn, delivering the main speech, held that it was appropriate to construe a one-off commercial document in a commercial rather than literal sense, and that there should be a tendency against 'literalism'. Lord Steyn was satisfied that the objectives of the parties in agreeing the Tomlin order were to compromise the arbitration and to allow for a draw-down on the letter of credit. The acknowledgment of liability in the Tomlin order meant that FAI had accepted that the risks insured against had occurred and there was liability; this was to be construed as agreement that Sirius should pay the claim; any other interpretation was literalistic. A further problem arose from the words 'all arguments ... are preserved', but the reservation

of rights had a very limited function and merely entitled the provisional liquidators to decide whether, for example, there had been dishonesty in the underlying transaction. There can be little doubt as to the correctness of the outcome: the entire purpose of the arrangements was to ensure that Sirius was not exposed to liability in respect of which there was no enforceable indemnity from either FAI or Westpac, and treating Sirius as having compromised the arbitration on any other basis was contrary to commercial reality.

[3.29] The Court of Appeal in *King v Brandywine Reinsurance Co (UK) Ltd* [2005] EWCA Civ 235, [2005] 2 All ER (Comm) 1 has upheld the decision of Colman J at first instance ([2004] EWHC 1033 (Comm), [2004] 2 All ER (Comm) 443), as reported in last year's Review. The reasoning was, however, quite different at every relevant stage. The Exxon Valdez ran aground in March 1989, causing a catastrophic oil spill. The owners of the vessel and the cargo, collectively, Exxon, were co-insured under a single policy which covered both first party property losses and third party liabilities. The insurers had reinsured their liability and in turn retrocession agreements were entered into. Claims were made by the US and Alaskan governments against the assured, and those claims were ultimately settled by Exxon in November 1992 for US\$900m. The claims were passed down the chain of reinsurance. The retrocessionaires denied liability, asserting that the losses did not fall within the terms of Exxon's policy so that the decision by the insurers to provide an indemnity had been unjustified and did not give rise to legal liability. The present action was one by the reinsurers against their retrocessionaires attempting to establish that the Exxon policy did in fact respond to the loss and accordingly that a chain of liabilities culminating with that of the retrocessionaires had been established. The case turned on the interpretation of certain key phrases in the direct policy, in particular whether an oil spill constituted 'debris' for the purposes of coverage. Colman J, at first instance, held that the direct policy was governed by English law, the learned judge giving little or no weight to a series of optional arbitration clauses providing for arbitration in New York. Colman J then concluded that as a matter of English law an oil spill was not 'debris' so that there was no coverage, although he went on to rule that had the applicable law been that of New York then the more liberal rules of construction applied by the New York courts would have led to the opposite conclusion. The Court of Appeal agreed that there was no coverage, but for entirely different reasons. The Court of Appeal's view was that the arbitration clauses were of sufficient weight to point to the conclusion that the Exxon policy was governed by New York law and not English law, in that even though arbitration was not mandatory, if there was arbitration it was to take place in New York. Turning then to the application of New York law to the wording, the Court of Appeal again disagreed with Colman J and held that New York law and English law produced the same result and that under their respective rules of

construction 'debris' did not encompass an oil spill. The Court of Appeal indeed emphasised that it would have been remarkable had the two systems reached different conclusions on what was an international agreement. All other points thus fell away, although there was inconclusive discussion as to whether an exclusion for 'pollution ... on land' referred to pollution affecting land or to pollution emanating from land, the majority tending towards the latter (noting that the use of words such as 'pollution of land' could have been used if that was intended), whereas Rix LJ saw an argument in favour of the former.

[3.30] The standard mechanism for the writing of facultative reinsurance agreements in the London market has long been the 'full reinsurance' clause, under which the terms of the direct policy are purportedly incorporated into the reinsurance. The courts in a series of decision have restricted, by tests of compatibility and appropriateness, the classes of term which may be carried across from an insurance to a reinsurance agreement. The courts have gone on to decide that, even if it is possible to incorporate a term, it might take effect in the reinsurance only in its 'unmanipulated' form, ie by identifying the circumstances in which the reinsured is liable (thereby acting as a follow settlements clause at the reinsurance level by at the same time identifying the circumstances in which the reinsurers were liable to provide an indemnity) rather than directly affecting the terms of the contractual relationship between the reinsured and the reinsurers. The limits of incorporation were explored by Richard Siberry QC, sitting as a deputy High Court judge, in *American International Marine Agency of New York Inc v Dandridge* [2005] EWHC 829 (Comm), [2005] 2 All ER (Comm) 496. This case concerned the insurance of a vessel by the claimants, who subscribed to 15% of the risk as part of the following market. The leading underwriter was Axa. The insurance was evidenced by a French Market Slip which incorporated ITC 1983 (including an automatic termination clause on change of class, plus a classification warranty), and by a later binder which set out the claimants' participation and which contained a leading underwriter clause under which the claimants agreed to follow Axa 'in all respects, including rates and claims but excluding ex gratia'. The claimants were reinsured by reinsurers under a slip which contained the full reinsurance clause stating that the reinsurance was 'subject to the same clauses and conditions and against the same perils as in the original policy' and to follow settlements. The vessel was originally classed with DNV, but the class expired on 31 August 2000. The vessel was reclassified with INSB as from 6 September 2000. Axa agreed orally to the change of class, and the value of the vessel was reduced from US\$2m to US\$1.5m: these changes were subsequently endorsed onto the insurance by Axa and also by the claimants. The reinsurers subsequently contended that they had been automatically discharged from liability on the change of class. The claimants' response was that they were by reason of the leading underwriter clause bound by Axa's variation of the direct policy, and that

the clause was incorporated into the reinsurance so that reinsurers were similarly bound by the variation. The reinsurers argued that: (a) the incorporating words in the reinsurance applied only to the French Market Slip and not to the later binder, so that the leading underwriter clause was not incorporated into the reinsurance; (b) if that was wrong and the binder was incorporated, the incorporating words did not extend to the leading underwriter clause; and (c) if that was wrong and the leading underwriter clause was incorporated, then it made no sense in the reinsurance. Mr Sibera QC accepted the reinsurers' arguments, and held that the 'the original policy or policies' in the full reinsurance clause applied only to the French Market Slip and not to the binder (which had been published and signed into after the date of the reinsurance), so that the leading underwriter clause was not incorporated. If that was wrong, then the leading underwriter clause was not incorporated into the reinsurance because it was not germane or apposite, it made no sense in the context of reinsurance and it was inconsistent with the express terms of the reinsurance. Assuming that the clause had been incorporated in an unmanipulated form, it plainly could not require the reinsurers to follow Axa's settlements, neither could it operate to remove from the reinsurers the right to take a defence under the reinsurance which had been removed from the claimants by reason of some variation by Axa. Although the last of these conclusions is purely obiter, it might be thought that there is a stronger argument than the court appreciated for a finding that, had the clause been incorporated in unmanipulated form, it would have indeed bound the reinsurers to follow Axa's settlements. The argument would run that the clause, incorporated into the reinsurance agreement in its unmanipulated form, operated as a statement of the circumstances in which the claimants were liable to pay under the direct policies and thus operated at the reinsurance level as a statement of the circumstances in which the reinsured – and thus the reinsurers – faced liability.

[3.31] Facultative reinsurance agreements are in many respects akin to liability policies, and nearly always contain claims provisions under which the reinsured is to notify the reinsurers as soon as possible after they become aware of circumstances likely to give rise to a claim. Thereafter, the reinsured is required to co-operate with the reinsurers in the handling of the claim. The notification clause in *Royal and Sun Alliance Insurance plc v Dornoch Ltd* [2005] EWCA Civ 238, [2005] 1 All ER (Comm) 590 was a curious one, the relevant part providing that 'the Reassured shall upon knowledge of any loss or losses which may give rise to claim under this policy, advise the Underwriters thereof by cable within 72 hours'. The problem with this type of wording is that it is designed for use in direct (as opposed to reinsurance) property covers, where the occurrence of the loss is immediate and obvious. Applied to a reinsurance agreement, the word 'loss' becomes ambiguous, even more so when the direct policy to which the reinsurance relates is itself a liability cover. All

of this became apparent in *Dornoch*. RSA had taken a 21.5% subscription on each of the three layers of a 'Master Subscription Policy' issued to the Coca-Cola group of companies. Part of the cover related to Directors' and Officers' liability and to the general liability of Coca-Cola, and was written on a claims made basis. Notice was to be given under the policy as soon as practicable after any claim had been made. RSA acted as a front for reinsurers, who reinsured RSA for 100% of its liability. Claims were made against Coca-Cola and three of its directors and officers in two class actions commenced in Georgia on 27 October 2000 and 13 November 2000. It was alleged that the defendants had overstated the value of Coca-Cola's stock, causing the claimants to purchase stock in the market at inflated prices. The basis of the claims was that Coca-Cola had artificially inflated its sales figures by forcing bottlers to accept unwanted deliveries of concentrate. RSA was informed of the claims on 30 December 2000, notice having earlier been given to the leading underwriter. RSA duly informed the reinsurers on 19 January 2001. The reinsurers asserted that there had been a breach of the claims control clause, as notification was required within 72 hours of RSA obtaining knowledge of losses. The dispute between the parties was as to the meaning of the claims control clause. At first instance ([2004] EWHC 803 (Comm), [2004] Lloyd's Rep IR 826) Aikens J held that there was no breach of the clause: the word loss referred to that suffered by the claimants against Coca-Cola, but RSA could not know that those claimants had suffered any loss until they obtained a judgment against Coca-Cola. It followed that a clause which was intended to give the reinsurers the right to intervene from the outset and to defend any claim against Coca-Cola was triggered only after the claim against Coca-Cola had proved to be successful. The Court of Appeal dismissed the appeal by relying on the second of Aikens J's reasons, namely that the phrase 'loss or losses' meant actual loss or losses and not simply alleged loss or losses. On that basis it did not need to be decided whether the losses referred to were those of the claimants against Coca-Cola or Coca-Cola itself, although Longmore LJ (delivering the only reasoned judgment) was inclined to favour the judge's answer to this question in favour of the former. Longmore LJ commented that the notification clause was inappropriate but that it remained the duty of the court to attempt to construe it. The analysis adopted by the Court of Appeal in effect deprived the clause of any real meaning, but Longmore LJ held that the parties were to be taken at their word, particularly if they had taken a clause from the precedent book which turned out to be unsuitable for its purpose.

[3.32] In *Equitas Ltd v Wave City Shipping Co Ltd* [2005] EWHC 923 (Comm), [2005] 2 All ER (Comm) 301 the assured raised an interesting argument which would, if accepted, have given it a direct cause of action against reinsurers. A vessel belonging to the assured became a total loss, but the claim against war risks insurers was rejected on the ground that

the cause of the loss was probably not a war risk. Various proceedings were commenced by the assured in Piraeus. Subsequently, the reinsurers of the war risks insurers received a threat of proceedings by the assured in tort. The allegation was that, by agreeing to pay profit commission to the war risks insurers, the reinsurers had given the insurers an incentive to refuse to pay claims and therefore that the reinsurers were guilty of the tort of interfering with the contractual relations between the assured and the insurers. The reinsurers sought a declaration that they were not liable. Christopher Clarke J granted the declaration and held that the claim was without foundation. On the facts there was no profit commission agreement in existence in the year of the loss. However, that point aside, the only possible tort was that of inducing or procuring a breach of contract. For that tort to be established it had to be shown that the reinsurers had the intention to interfere with knowledge of the contract: it was not enough that the breach was the natural consequence of the alleged tortfeasor's act. It may be commented in passing that the court accepted that it would have had jurisdiction to hear a valid complaint of this type: the declaration related to a claim in tort, and because the alleged harmful act – the payment of profit commissions – had occurred in England, the English court was seised under art 5(3) of Council Regulation (EC) 44/2001 and that article contemplated an action for a negative declaration in respect of a potential tort claim.

Intellectual property

Copyright

[3.33] Copyright resides in original literary, dramatic, musical and artistic works. Copyright disputes regularly arise in respect of new works which are created by reliance to a greater or lesser degree on some earlier work, and in addressing the question whether the new work attracts copyright in its own right (the question whether it is an infringing work is entirely separate, as even a new copyright work can infringe the copyright in another work) it is necessary to ask if sufficient skill and judgment has been adopted in the creation of that new work. The point arose in an acute form in *Sawkins v Hyperion Records Ltd* [2005] EWCA Civ 565, [2005] 3 All ER 636, a case which also discusses meaning of 'music' for copyright purposes. The claimant, an acknowledged expert on the seventeenth-century French composer Lalande, produced versions of three of Lalande's work for performance in a manner which enabled them to be performed. The original works were in the form of handwritten scores in which numerous notes were omitted and in which parts of the melody had not been aligned with the chords. The claimant was required to exercise a high degree of skill in decoding the scores and in part in guessing exactly what Lalande had intended: up to 300 hours of work were devoted to each piece. The works were duly performed, and recordings of the performances were released on compact disc by the

defendant record company. The claimant asserted that he had copyright in the performing editions and that this had been infringed by their unauthorised release as sound recordings. The defendant contested the claim on two grounds: the claimant's work was not original, and it was not musical. Each of these objections was rejected and judgment was given for the claimant. Turning first to originality, the Court of Appeal confirmed that the mere fact that a new work was derived from an earlier work, and indeed was a copy of that earlier work, did not provide the new work of originality. The Court of Appeal held that earlier dicta (in particular those of Lord Oliver in *Interlego AG v Tyco Industries Inc* [1988] 3 All ER 949) to the effect that skill and labour expended in copying an earlier work could never lead to the creation of a new copyright work went too far and should be confined to cases of mechanical copying: the true principle was that if sufficient skill and effort was devoted to creating a copy, then the copy was itself a copyright work. Thus, an artist who painted a copy of an earlier painting could be regarded as having created his own copyright work even though he had thereby infringed the copyright in the earlier painting (assuming of course that its copyright had not expired). On this test the claimant's work was plainly original. As to its classification as 'music', Jacob LJ commented that the threshold test was a low one in that 'A work may be complete rubbish and utterly worthless, but copyright protection may be available for it', and Mummery LJ applied that principle to a musical work:

[T]he essence of music is combining sounds for listening to. Music is not the same as mere noise. The sound of music is intended to produce effects of some kind on the listener's emotions and intellect. The sounds may be produced by an organised performance on instruments played from a musical score, though that is not essential for the existence of the music or of copyright in it ... There is no reason why, for example, a recording of a person's spontaneous singing, whistling or humming or of improvisations of sounds by a group of people with or without musical instruments should not be regarded as "music" for copyright purposes.'

Applying this to the facts, the Court of Appeal held that musical works had been created. By focusing on the importance of the sound created rather than the score itself, the Court of Appeal was able to expose the fallacy in the suggestion that a musical work could be created only by adding new music and not by creating a performance version of an existing work.

[3.34] Article 10.1 of the EC's Rental and Lending Directive, Council Directive (EEC) 92/100 requires member states to ensure that equitable remuneration is payable to the owner of the copyright in a sound recording for its use. This provision apparently required amendment of the Copyright Designs and Patents Act 1988, ss 67 and 72, which in their original form respectively conferred upon clubs and premises with non-paying audiences the right to play sound recordings without infringing any copyright in those recordings. The due date of

implementation of this Directive was 1 July 1994: in fact implementation – by statutory instrument – was some two years late, but at that time no changes were made to ss 67 and 72. Matters were taken a step further by the EC's Information Society Copyright Directive, Council Directive (EC) 2001/29, which modified art 10 of the 1992 Directive and in effect required the repeal of the exclusions as they stood. The 2001 Directive was due to be implemented by 22 December 2002, but the relevant implementing regulations did not come into effect until 31 October 2003 on which date the required amendments to ss 67 and 72 were made. In the meantime, in March 2003, the claimant, which administers rights over sound recordings on behalf of record companies, commenced the present action – *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch), [2005] 1 All ER 369 – seeking declaratory relief and damages in respect of the UK's failure to implement the Rental and Lending Directive. The main question before Sir Andrew Morritt V-C was whether the action was time-barred after six years running from the due date of the implementation of that Directive. The court ruled that there was no time-bar: any breach of duty by the government was not confined to the due date of implementation, but rather was a continuing breach which continued up until the default had been rectified. The action could thus go ahead.

Patents

[3.35] *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46, [2005] 1 All ER 667 is for the most part a tour de force by Lord Hoffmann, with which the other members of the House of Lords were more than happy to agree, on the application of the European Patent Convention (EPC) to medical processes. The claimants had patented a DNA sequence for the production of a protein (EPO) which regulated the level of red blood cells. A different method of making EPO was developed by the defendant. The claimant asserted that two of the claims in its patent had been infringed. The defendant sought a declaration that the patent had not been infringed and that the patent should not have been registered because one of the claims was not novel on the basis that the product formed a part of the state of the art even though the process was new, and another of the claims had not been sufficiently specified (as required by s 72 of the Patents Act 1977 incorporating the EPC into English law). The House of Lords concluded that the defendant's product did not infringe the claimant's patent claim, and also that the claim was invalid for insufficiency. On the first point the issue was the proper construction of the patent specification. Article 69 of the EPC provides that the extent of the protection conferred by a European patent is 'determined by the terms of the claims'. Lord Hoffmann traced the history the patent specifications and noted that the English approach prior to the EPC had been artificially to confine the scope of the patent monopoly to the terms of the claim itself, in the interests of certainty

while in other jurisdictions – notably the Netherlands and Germany – the approach had been to use the claim itself as the starting point and to focus on the underlying inventive concept. A compromise between these approaches was reached in the form of a Protocol on the Interpretation of Article 69 appended to the EPC: the Protocol opted for a mid-way approach under which the claim itself is not to be regarded as exhaustive but neither is it to be the mere starting point. Lord Hoffmann's conclusion was that literalism had been abandoned by the Protocol and that the courts were – in line with the general move towards the factual matrix in the interpretation of commercial documents – required to give the patent specification the meaning 'which a reasonable person skilled in the art, reading the claims in context, would think [the applicant] was intended to claim' (at [48]). In so deciding, Lord Hoffmann rejected the US doctrine of 'equivalents' under which the patent specification and thus the patent monopoly is extended to inventions which perform an equivalent function, although accepted that equivalence could be an aid to construction in so far as it formed a part of the background of facts known to a person skilled in the art. Applying that principle to the complex facts before him, Lord Hoffmann concluded that the patent specification did not extend to the defendant's own process and that there was no infringement. Lord Hoffmann went on to hold, on the validity point, that, of the two contested claims, the first was not novel in that a novel process did not necessarily make the product of that process new if the product formed a part of the state of the art, and the second was not sufficiently specified.

Trade marks

[3.36] A range of key issues of principle have been dealt with in cases decided by the European Court of Justice and reported in 2005. In *Nichols plc v Registrar of Trade Marks* Case C-404/02 [2005] All ER (EC) 1 the question was whether a name could be registered as a trade mark. Article 2 of the Trade Marks Directive, Council Directive (EEC) 89/104 provides that a trade mark may consist of a personal name as long as it is capable of distinguishing the goods or services of one undertaking from those of other undertakings, and art 3.1(b) confirms that a mark is not to be registered if it is devoid of any distinctive character. Article 6.1(a) goes on to state that a trade mark cannot prevent the use by a third party of his own name. The ECJ's view of the interrelationship of these provisions was that the assessment of registrability was independent of the principle in art 6.1(a), and that the sole question was whether the name was one capable of distinguishing the applicant's goods or services. If, therefore, the name had by use become associated with the applicant's goods or services or was otherwise distinctive, then registration was to be granted: the fact that another person might be entitled to use his own name and to avoid infringement proceedings by reason of art 6.1(a) did not affect the validity of the registration.

[3.37] Distinctive character was also the main issue before the ECJ in *Koninklijke KPN Nederland NV v Benelux-Merkenbureau* Case C-363/99 [2005] All ER (EC) 19, although the ECJ also considered the effect of art 3.1(c) which precludes registration of a mark which merely identifies the characteristics of the goods or services to which it relates. The Benelux Trade Mark Office had refused to register the word 'Postkantoor' (Post Office), on the ground that it did not possess a distinctive character (art 6(1)(b)). This refusal led to no fewer than nine questions being referred to the ECJ for its preliminary ruling. It suffices to say here that the ECJ ruled that: a registration authority is required to have regard to all relevant facts and circumstances before adopting a final decision on registration, so that it is necessary to take into account the fact that the mark had been widely used by the applicant prior to the application and had not been used in a deceptive fashion; the authority is to disregard registration in another member state in respect of the same goods or services; art 3.1(c) precluded registration even though there are more usual indications for designating those characteristics, and that it was necessary also to consider whether the word when translated into other languages used in the relevant area contravened art 3.1(c); a mark which is merely descriptive of some goods and services and thus incapable of registration under art 3.1(c) is not for that reason alone to be regarded as distinctive for the purposes of art 3.1(b); a word composed of elements which are themselves descriptive of goods or services is to be treated as purely descriptive under art 3.1(c) unless there is a perceptible difference between the elements of the word and the sum of those constituent parts; and a registration authority cannot grant registration on the basis that the mark is not 'manifestly inadmissible' – if a mark is not registrable under the Directive, then it is not open to a national authority to register on the basis that the inadmissibility is not manifest.

[3.38] Article 6.1(c) of the Trade Marks Directive authorises a third party to use a trade mark 'where ... necessary to indicate the intended purpose of a product or service, in particular as accessories or spare parts; provided he uses them in accordance with honest practices in industrial or commercial matters'. The manufacturer of spare parts for trade marked goods may, therefore, indicate on his product that it can be used with the trade marked goods. There are, however, two restrictions on art 6.1(c): the use of the trade mark must be 'necessary' to indicate the intended purpose; and the use must 'in accordance with honest practices'. These two restrictions were considered by the ECJ in *Gillette Co v LA-Laboratories Ltd Oy* Case C-228/03 [2005] All ER (EC) 940, in which the claimants sought to prevent the defendants from advertising, by use of the claimants' mark, that the defendants' blades were compatible with razors manufactured by the claimants as well as the defendants' own razor. The ECJ held: that the fact that the defendants themselves manufactured competing products was not relevant; that it was for the national court to decide whether use was necessary (taking into account

whether alternative methods of communication were practicable); and that in assessing the honesty of the defendants' practice the national court was to take into account considerations such as whether the use gave the impression that there was a commercial connection between the defendants and the trade mark, whether the value of the trade mark was diminished, whether the mark was denigrated or discredited and whether the third party presented its own product as a replica of the product bearing the trade mark.

[3.39] Finally, *Peak Holding AB v Axolin-Elinor AB* Case C-16/03 [2005] All ER (EC) 723 raised the much-litigated problem of exhaustion of rights enshrined in art 7 of the Trade Marks Directive. Article 7 provides that a trade mark proprietor may not prohibit the use of the mark in respect of goods which have been put on the market in the EEA by him or with his consent. The ECJ, applying its familiar case law, held that a trade mark proprietor who imported goods bearing the mark into the EEA but without actually selling them in the EEA was not to be regarded as having put those goods on the market and thus his rights were not lost by exhaustion. Conversely, the sale of goods by the proprietor to a customer within the EEA subject to the condition that those goods were not to be resold by the customer within the EEA amounted to putting the goods on the market and thus brought the exhaustion principle into play.

Security

[3.40] The security under consideration by the House of Lords in *Concord Trust v Law Debenture Trust Corpn plc* [2005] UKHL 27, [2005] 1 All ER (Comm) 699 was in respect of bonds issued on the terms of a trust deed and administered by the defendant trustee. The debtor, Elektrim, issued bonds to the value of €510m, which fell due for payment in December 2005. Payment was guaranteed by Elektrim's parent company. Payment of the sums due under the bond could be accelerated on the happening of any of the Events of Default listed in the trust deed: in those circumstances the trustee was required, if so requested in writing by 30% in value of the bondholders, to serve a notice of acceleration and thereby to demand immediate repayment. The present dispute arose following the suspension by Elektrim from its management board of a member nominated by the bondholders. The trustee notified Elektrim that this was an Event of Default and certified that it was materially prejudicial to the bondholders. Soon afterwards, 71% in value of the bondholders requested the trustee to serve a notice of acceleration. Elektrim denied that there had been any Event of Default and informed the trustee that service of a notice of acceleration would cause them significant loss. The trustee, fearful of an action by Elektrim and unable to obtain adequate promises of indemnity from the bondholders, refused to issue a notice of acceleration unless it received a promise of indemnity in the sum of €1bn. The House of Lords ruled that the trust deed did not give the trustee any discretion in the matter, and that if the requisite

proportion of bondholders requested the service of a notice of acceleration then it had to be served, and it was immaterial that Elektrim contested the validity of the notice. Turning to the level of indemnity requested, their Lordships ruled that the level of indemnity sought by the trustee was grossly excessive in that there was no arguable cause of action against the trustee by Elektrim in the event that a notice of acceleration served wrongfully could give rise to an action for substantial damages. In particular: there was no basis for implying into the trust deed a term that a wrongful notice of acceleration would not be given; there was no duty of care owed by the trustee to Elektrim; the possibility that the trustee could be found liable for conspiracy to injure Elektrim by unlawful means was fanciful; and there was no basis for the suggestion that an invalid notice could constitute unlawful means for the purposes of the tort of interfering with Elektrim's business by unlawful means. In the light of this ruling the only indemnity which could be sought by the trustee was in respect of its reasonable costs.

[3.41] Unsurprisingly, in *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2005] UKHL 41, [2005] 4 All ER 209 (see also [4.8]–[4.13] below), the House of Lords confirmed the approach of the Privy Council in *Agnew v IRC* [2001] UKPC 28, [2001] 2 BCLC 188 and ruled that a charge on book debts which leaves the chargor free to use the charged assets can by its nature constitute only a floating charge and not a fixed charge. Spectrum had charged its book debts to the claimant bank to secure its indebtedness. The charge was stated to be a specific charge on debts now and from time to time due or owing. Spectrum was required to pay receipts into its account and could not assign or otherwise deal with those debts other than with the consent of the bank, although there was no evidence that the bank ever sought to exercise any control over the operation of – and, in particular, withdrawals from – the account. Following the voluntary liquidation of Spectrum, the bank claimed that the charge was a fixed one and thus conferred priority over preferred creditors (in particular the Crown). The bank relied upon the much criticised decision in *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142, in which a similar charge was held to be fixed. The Crown asserted that the charge was a floating charge, and relied upon s 175(2)(b) of the Insolvency Act 1986, which postpones floating charges to preferential creditors: that had been the conclusion in *Agnew*. Their Lordships held that the charge was a floating charge, and identified the essential feature of a floating charge as being that the company could carry on its business in the usual way in respect of the charged assets so that those assets were not finally appropriated as a security for the payment of the debt until the occurrence of some future event. If it was the case that the chargor was free to use the charged asset and to remove it from the security, the charge was incapable of being fixed, and it was immaterial that it was described as such in the loan documentation. The critical question in the present case was whether Spectrum could draw on

the bank account. Their Lordships concluded that this was the situation: the fact that Spectrum was restricted in its rights to deal with uncollected book debts was not the point, as what mattered was that Spectrum was free to use payments made by its debtors for its own purposes. The House of Lords did not preclude the possibility that a fixed charge over book debts could be created, but held that this had not happened in the present case. A more complex issue faced by their Lordships was whether the *Siebe Gorman* decision should, in accordance with established principle, be overruled with retrospective effect or whether it should be overruled prospectively only. The argument by the bank in favour of a prospective overruling only was that in the years since *Siebe Gorman* had been decided banks had conducted their business on the basis that charges over book debts were fixed charges even though the chargor's bank account was not blocked. The House of Lords dismissed this suggestion for two reasons. The narrow ground was that banks could not claim to have been led into a false sense of security by a first instance decision which did not definitively settle the law. More generally, however, prospective overruling would amount to a judicial assertion of a power of law-making and could not be justified other than in the most exceptional circumstances.

[3.42] Bonds issued by banks and insurers in respect of the guarantee of the due performance of a sale or construction contract may take one of two forms. They may be unconditional on demand performance bonds under which the bank is required to make payment to the beneficiary simply when a demand for payment is made. Alternatively, they may be guarantees, so that payment is due only when the beneficiary has demonstrated that there has been default in the performance of the contract and that the defaulting party has incurred a liability which he has not satisfied. The proper construction of the bond was at stake in *Marubeni Hong Kong and South China Ltd v Government of Mongolia* [2005] EWCA Civ 395, [2005] 2 All ER (Comm) 289. The claimant entered into a contract with a Mongolian company, Buyan, for the supply of equipment for a cashmere production plant. The price was to be paid by an initial instalment 60 days after the making of the contract and thereafter in 12 equal half-yearly instalments. The Mongolian central bank, acting for the Mongolian government, issued a document described as a 'guarantee' to the claimant, and further stated that the bank 'unconditionally pledges to pay to you upon simple demand all amounts payable under the Agreement if not paid when the same becomes due'. The financing arrangements between the claimant and Buyan were thereafter varied, and the Mongolian government argued that those arrangements operated to discharge the guarantee under the rule in *Holme v Brunskill* (1877) 3 QBD 495. The claimant's argument was that the document was an unconditional on demand performance bond which was unaffected by the changes in the underlying arrangements. At first instance ([2004] EWHC 472 (Comm), [2004] All ER (D) 257 (Mar)), numerous issues arose as to the validity of the guarantee under

Mongolian law and whether it was an authorised document, but these were resolved in favour of the claimant and there was no appeal against them. On the interpretation issue, Cresswell J held that the document was a guarantee and not a performance bond, and accordingly the bank's liability had been discharged. The Court of Appeal agreed with this conclusion, and held that the fact that the document was described as a guarantee raised a strong presumption that this was indeed the case, and that there was nothing in the wording to rebut that presumption. The words 'unconditionally pledges' and 'simple demand' were qualified by the remainder of the sentence which made it clear that nothing was payable unless sums had fallen due, which was consistent only with a secondary liability. The judgment is of interest for its lengthy review of the cases on the construction of guarantees and bonds, and the conclusion that documents issued by banks and described as performance bonds are quite different from simple guarantees.

[3.43] *UCB Corporate Services Ltd v Thomason* [2005] EWCA Civ 225, [2005] 1 All ER (Comm) 601, the first instance decision in which ([2004] EWHC 1164 (Ch), [2004] 2 All ER (Comm) 774) was considered in last year's Review, raised the question whether a waiver agreement putting an end to personal liabilities accepted by guarantors could be set aside by the creditor bank. The waiver agreement was made on the basis that the guarantors had made full disclosure of all their assets and liabilities, and its proviso stated that the bank had the right to treat the agreement as discharged in the event that further material assets were discovered in which the guarantors had a proven beneficial interest. The guarantors failed to disclose a variety of matters relating to the beneficial interest of property. The Court of Appeal affirmed Pumfrey J's conclusion that there had been a lamentable absence of frankness but that this related to matters outside the proviso and thus did not give the bank any right to treat the waiver agreement as being at an end. The Court of Appeal also agreed with Pumfrey J that the bank had been entitled to rely upon its general rights outside the proviso to the waiver agreement, and in particular the right to seek remedies in respect of positive misrepresentations made by the guarantors. However, the Court of Appeal accepted the trial judge's view that the bank's position would have been no better had the guarantee not been entered into and, accordingly, that the guarantor's misrepresentations had not caused any loss: it was thus appropriate for the court to refuse rescission of the waiver agreement under s 2(2) of the Misrepresentation Act 1967. (See also [8.18] below.)

Company Law

JENNIFER PAYNE, MA

Solicitor, Travers Smith Lecturer in Corporate Finance Law, University of Oxford and Fellow of Merton College, Oxford

Directors' duties

[4.1] The decision in *Secretary of State for Trade and Industry v Swan* [2005] EWHC 603 (Ch), [2005] All ER (D) 102 (Apr) arose out of proceedings under the Company Directors Disqualification Act 1986 (CDDA). It casts light on the common law duty of care and skill expected of directors and also on the role of non-executive directors in the governance of large listed companies in the UK. Last year the recommendations of the Higgs Report, which reviewed the role and effectiveness of non-executive directors, were largely adopted and now form part of the Combined Code. In *Equitable Life Assurance Society v Bowley* [2003] EWHC 2263 (Comm), [2004] 1 BCLC 180 (see All ER Rev 2004 at [4.21]) Langley J stated that the duties of non-executive directors align with those of executive directors, theoretically at least. In terms of the functions of non-executive directors the law is developing, although '[i]t is plainly arguable ... that a company may reasonably at least look to non-executive directors for independence of judgment and supervision of the executive management' (at [41]). The decision in *Swan* is of interest because it provides more guidance on what is expected of non-executive directors of listed companies in relation to their directorships. It signals quite clearly the supervisory role that such directors are expected to perform.

[4.2] The case arose as a result of disqualification orders being sought under s 6 of the CDDA against S, the chairman and CEO of a company (F), and the senior non-executive director of that company, N. The principal allegation was that they had actual knowledge of so-called 'cheque kiting' activities carried on by the group of companies of which F was a member. In the alternative, it was argued that S ought to have known of this activity and that N had failed to take appropriate action after being informed by a whistle-blower of the cheque kiting policy. Cheque kiting involves the 'kiter' using the time it takes for a cheque to clear to obtain a fictional increase in the balance of the payee's account prior to the cheque being cleared by the bank and the payer's account being debited. On the particular facts, cheques were passed between two subsidiaries which created the impression that these companies had more money than they actually had. Cheque kiting, although not strictly illegal, is certainly 'commercially improper and unacceptable' ([2005] EWHC 603 at [21]).

[4.3] In this case, as a matter of company policy every cheque for a sum greater than £25,000 had to be signed by either S or the finance director. During a time when the finance director was on holiday, S signed four crossing cheques of equal large amounts between the two subsidiaries. This was the cheque kiting activity. Etherton J found that the evidence was insufficiently cogent to support the claim that S had actual knowledge of the cheque kiting policy. He was a businessman of obvious skill in operational matters but lacked interest in the technicalities of financial and accounting issues, which he regarded as irrelevant to the profit and loss of the group. However, Etherton J found that these payments ‘cried out’ for enquiry. Etherton J found that S’s failure to enquire into the reason for these cheques amounted to assisting the policy of cheque kiting. Accordingly, his conduct fell far short of the level of competence expected of a director in his position: it was ‘a serious dereliction of his duty as a director’ (at [209]) and his behaviour did amount to unfitness. Etherton J also considered the appropriateness of S’s behaviour in relation to the sale of one of F’s subsidiaries. When F sold the subsidiary, the explanatory circular required by the listing rules included a statement of indebtedness which was misleading due to the cheque kiting activity. However, on this point Etherton J decided that it was not unreasonable for S, who was a busy man, to leave it to his finance team to check the figures in the explanatory circular. S’s behaviour in this regard did not amount to unfitness for the purposes of the CDDA.

[4.4] The case against N was slightly different. N’s role as non-executive director and chairman of the audit committee meant that he was made aware of various accounting and financial irregularities raised by a whistle-blower. It was significant that N was a very experienced accountant. He was a man of substantial financial expertise and therefore a high standard was expected of him on the dual subjective/objective test set out in s 214(4) of the Insolvency Act 1986 (see eg *Re D’Jan of London* [1994] 1 BCLC 561). N’s response to the allegations was a brief meeting between himself, S, the finance director (who was accused of the cheque kiting) and the chief operating officer (the whistle-blower) to discuss them, after which N decided to take no further action. If he had questioned further he would have discovered the cheque kiting. Therefore, while the judge rejected the claim that N knew specifically of the cheque kiting, he took the view that N’s reaction fell seriously below the standard of conduct expected of someone occupying his position and having his experience. The meeting he had called had lasted less than 40 minutes. As such, it was a wholly inappropriate response to serious allegations involving a finance director of a listed company. Further, N’s failure to discuss the allegations with his fellow non-executive directors or to communicate with the company’s auditors was a serious breach of duty. N seemed to have placed an unquestioning reliance on the finance director to do his job. As *Re Barings plc, Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433 makes clear, directors are

entitled to delegate their functions and to trust the competence and integrity of others, but this does not absolve them of a duty to supervise the delegated functions. Etherton J concluded that 'the lapse of judgment was a very serious one, at precisely the moment and in the type of situation in which decisive, courageous and independent action is required by a non-executive director' (at [241]). This echoes the provisions of the Higgs Report which provides that sound judgment is central to the non-executive director's role (www.dti.gov.uk/cld/non_exec_review/pdfs/higgsreport.pdf, para 6.14). Etherton J came to the conclusion that N's conduct in failing to pursue his investigation with vigour rendered him unfit within CDDA, s 6(1) and he was disqualified for three years. The decision in *Swan* shows that the courts are prepared to adopt a rigorous stance in relation to non-executive directors which resonates with the level of expectations being placed on these individuals by the corporate governance codes.

Alterations of articles

[4.5] Shareholders can alter the articles of association by a special resolution (Companies Act 1985, s 9), however, in doing so they must vote bona fide for the benefit of the company as a whole (*Allen v Gold Reefs of West Africa* [1900] 1 Ch 656, [1900-3] All ER Rep 746). The application of this test has been an issue of some dispute, particularly where the alteration is effectively being used to expropriate the shares of the minority shareholders. This issue arose particularly starkly on the facts of *Constable v Executive Connections Ltd* [2005] EWHC 3 (Ch), [2005] 2 BCLC 638.

[4.6] In this case the company's share capital was divided into A and B shares. The claimant held all the B shares, which gave him rights to income and capital and a right to attend general meetings but not to vote. In effect the claimant had a 5% interest in the company but no right to participate in management. Relations deteriorated between the A shareholder and the claimant, with the claimant consistently refusing to sell his shares to the A shareholder, despite the offers being at a price consistent with the value placed on his shares by an independent valuer. As a result, the articles of the company were altered by a special resolution to incorporate drag along and tag along rights. A new subsidiary was then incorporated by the A shareholder which made an offer to both the A and B shareholders to sell their shares. The A shareholder accepted and then the altered articles were relied upon to require the claimant to sell his shares, at a price at least equal to the value of his shares at that time. The claimant then sought a declaration that the alteration to the articles was invalid, and an injunction to prevent the company from implementing or enforcing the new article, on the basis that it was in breach of the *Allen v Gold Reefs of West Africa* principle.

After analysing the case law on this point the judge, Christopher Nugee QC, sitting as a deputy judge of the High Court, stated (at [29]) that:

‘I do not regard the law in this area as clear or easy to apply ... Indeed the more one looks at the decided cases, the more hard it is to know precisely where the line is to be drawn between those cases where the introduction of a compulsory transfer provision will be upheld and those where it will not.’

[4.7] The judge considered the decision in *Gambotto v WCP Ltd* (1995) ACLC 342, [1995] 2 LRC 368, in which the High Court of Australia rejected the ‘bona fide for the company as a whole’ test. The Company Law Review considered the *Gambotto* approach but rejected it, recommending no change to the law on this issue. Accordingly, the Company Law Reform Bill published in November 2005 leaves this issue untouched. This is unfortunate. The judge in *Constable* was clear that he had no choice but to attempt to apply the *Allen* test. It is telling that a judge found the law on this issue to be so difficult to apply even where the facts are as stark as those here. As the judge acknowledged (at [29]), the amended article in this case was ‘very close to ... a naked compulsory transfer provision’. Although it could only be triggered by an offer for the sale of shares of the company, it will generally not be difficult for a majority shareholder (as here) to cause such an offer to be made. The effect of the article, therefore, was to enable the majority shareholder to acquire the minority shares whenever it wished to do so. The judge rejected the submission that there was no serious issue to be tried, but was clearly unhappy about the ‘untidy state of the law’ (at [30]) on this issue. Unfortunately, due to lack of funds, this case will not be appealed. This is an area in need of an injection of coherence. That said, the more obvious, and possibly more appropriate, route for disgruntled minorities such as the claimant here is s 459 of the Companies Act 1985. There is much to be said for the view that, contrary to *Gambotto*, a share should not generally be regarded as a shareholder’s absolute property, and that rights attached to shares are always subject to the articles and hence to the ability of the majority to alter them. On this analysis, majority shareholders should be able to expropriate the shares of the minority providing fair value is received for the shares and the expropriation is otherwise carried out in a manner which does not infringe s 459.

Company charges

[4.8] The House of Lords in *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2005] UKHL 41, [2005] 4 All ER 209 allowed an appeal against the decision of the Court of Appeal ([2004] EWCA Civ 670, [2004] All ER 995: see All ER Rev 2004 at [4.27]–[4.29]). Spectrum granted a charge to NatWest over its book debts. It did this by a clause in a debenture which secured Spectrum’s obligation to NatWest to repay borrowings under an overdraft facility. The debenture provided that the charge over the book debts was a specific

(ie fixed) charge and required the company to pay the proceeds of the debts when received into the company's account and prohibited the company from charging or assigning the debts. However, the debenture did not specify any restrictions on the company's operation of that account. In practice, the proceeds of the book debts were paid into Spectrum's account with NatWest and Spectrum drew on the account as necessary. Spectrum went into liquidation. The liquidators collected the book debts but refused to account to them to NatWest. At first instance ([2004] EWHC 9 (Ch), [2004] 1 All ER 981, [2004] 1 BCLC 335) Morritt V-C held that the charge should be characterised as a floating charge because the debenture permitted Spectrum to use the proceeds in the normal course of business. He further held that, in reaching a contrary conclusion in relation to a debenture in identical form, *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142 had been incorrectly decided. The Court of Appeal, to the general surprise of both academics and practitioners, held that the debenture imposed sufficient restrictions upon dealings with the proceeds of the book debts to justify characterising the security as fixed. On appeal, their Lordships held unanimously that the charge was floating and that *Siebe Gorman* had been wrongly decided. In addition, their Lordships were asked to consider whether the decision in *Siebe Gorman* should only be overruled prospectively, given that the banks had for many years drafted their security documents on the basis that the decision was correct. Again, their Lordships were unanimous in rejecting this possibility on the facts before them.

[4.9] The courts have struggled for some time to distinguish between fixed and floating charges over book debts. In *Spectrum Plus* the House of Lords had an opportunity to bring some order to this area. The first issue considered by their Lordships was the legal test to be applied in order to distinguish fixed and floating charges. In relation to charges over book debts, the particular issue is whether, in order for a charge to be characterised as fixed, there must be restrictions on the chargor's ability to deal with both the uncollected book debts themselves and the proceeds upon collection. The orthodox position is that the chargee must have control over both for the charge to be fixed (see Slade J in *Siebe Gorman*, as approved by the Privy Council in *Agnew v IRC* [2001] UKPC 28, [2001] 2 BCLC 188). Doubt has been cast on this orthodoxy by subsequent decisions, most controversially by the Court of Appeal in *Re New Bullas Trading Ltd* [1994] 1 BCLC 485, in which it was suggested that the parties in that case had succeeded in establishing a fixed charge over the uncollected book debts and a floating charge over their proceeds. In *Spectrum Plus* Lord Scott resolved this issue by overruling *New Bullas* and confirming the traditional view that, as the essential value of a book debt lay in its realisation, the nature of the restrictions on dealing with the

proceeds necessarily characterised the charge over the book debts themselves (at [110]–[111]; see also Lord Walker at [151]). The clarification of this issue is to be welcomed.

[4.10] The second issue for the House of Lords was the application of this approach to the wording of the specific charge before them, which was in all material respects identical to that considered in *Siebe Gorman*. Whilst approving Slade J's statements of principle in *Siebe Gorman*, their Lordships in *Spectrum Plus* held that his characterisation of the charge as fixed was flawed, and that the form of debenture used in both *Siebe Gorman* and *Spectrum Plus* created a floating charge, for a number of reasons. First, the enquiry must focus on the parties' entitlements to the proceeds of the book debts, as discussed above, and in the *Siebe Gorman* and *Spectrum Plus* debenture the proceeds of the book debts were to be paid into an ordinary trading account with the chargee, an account that was not blocked in any way. Instead, the chargor had unrestricted access to the proceeds of the book debts. Lord Hope stated that this was 'wholly destructive of the argument that there was a fixed charge' (at [61]). To be certain of creating a fixed charge, the proceeds of the book debts should be paid into a blocked account, which the chargor may only access with the chargee's consent. It is possible that a partially blocked account, such as one in which the purposes for which the proceeds might be used are limited (eg Wood 'Fixed and Floating Charges' [2001] CLJ 472, 473) might still allow for the creation of a fixed charge, as the courts have emphasised that some degree of freedom with the charges assets is not necessarily inconsistent with the existence of a fixed charge, but the validity of this method of creating a fixed charge over book debts will only be clear after the courts have had an opportunity to consider this issue.

[4.11] Next, as Lord Scott and Lord Walker emphasised, the label attached by the parties to the charge is not determinative of the issue. This was a factor upon which Slade J had seemed to place a lot of weight in *Siebe Gorman*. However, their Lordships in *Spectrum Plus* emphasised that it is for the court and not the parties to characterise the nature of the charge, a point which was forcefully made in *Agnew v IRC*. Their Lordships also accepted that whether the account into which the proceeds were paid was overdrawn or in credit was irrelevant to the characterisation of the charge. Any other conclusion would lead to the character of the charge altering as the account balance fluctuates. This clarification is helpful.

[4.12] It is unfortunate that their Lordships made no attempt to answer some of the other issues surrounding fixed and floating charges at the same time as resolving these issues. In particular, the theoretical basis for floating charges remains unclear. This issue was only addressed by Lord Walker, and then very briefly (at [139]). Lord Walker seems to prefer the view put forward by Professor Goode on this matter, ie that a floating

charge gives the chargee a proprietary interest in a fund. However, at the same time Lord Walker also cited with approval the work of Professor Worthington, who puts forward a quite different theoretical analysis of the floating charge. This was an opportunity for the House of Lords to settle some difficult issues regarding charges. Unfortunately, they confined themselves to answering a narrower set of questions. This judgment helpfully clarifies the status of *Siebe Gorman* and it will undo the confusion caused by the Court of Appeal's judgment in *Spectrum*. However, without clearer underlying principles regarding the nature, theoretical basis and purpose of the fixed/floating charge, it will only be a matter of time before the drafters of charges find new ways to challenge the law in order to allow the lender the advantages of a fixed security while preserving as much of the chargor's access to the proceeds of book debts as possible. Litigation on the characterisation of fixed and floating charges will, inevitably, continue.

[4.13] The decision in *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517, [2005] 1 BCLC 623 is also of interest. As a matter of law, a chargor has an implied power, which is sometimes mirrored by an express power, to deal with those of its assets that are subject to a floating charge in the ordinary course of its business (see, for instance, the general discussion by Lord Millett in *Agnew v IRC* [2001] UKPC 28, [2001] 2 BCLC 188). The debate in *Spectrum Plus* centred around the issue of whether the chargor had been effectively deprived of that power. In *Ashborder* Etherton J considered the meaning of the term 'the ordinary course of business' for these purposes. The case concerned a finance agreement and an accompanying charge over petroleum extraction licences and the chargor's holdings in the share capital of other companies. Under the express provisions of the facility agreement and the accompanying provisions of the security document, the chargor was prohibited from disposing of its assets, except for disposals in the ordinary course of its business.

[4.14] In order to determine whether various transactions were actually in the ordinary course of business, Etherton J had first to consider whether the debentures created a fixed or a floating charge and whether the nature of the assets themselves were relevant for the purpose of determining this issue. Of course, the nature of the assets can have relevance to the determination of the question of how free the charger is to deal with those assets. Charges expressed to be fixed but taken over a highly fluctuating body of assets such as the company's stock in trade or raw materials will generally be construed by the courts as floating charges. This recognises the reality of the fact that the chargor would not be able to make use of its assets without constant reference to the chargee, which will generally be commercially impractical. The assets in *Ashborder* (the licences and shares) were not part of the group's circulating assets or stock in trade which it needed to sell as part of its ordinary business. However, the judge cautioned against making too much of this point

(at [183]). Etherton J indicated that in construing whether a chargee has sufficient control over the charged assets for the charge to be considered as fixed, the court will first look at the ordinary and natural meaning of the words in the debenture. If chargor has been given a unilateral power to dispose of the assets in the ordinary course of business, then the charge is floating, not fixed. It is only if, upon its true construction, the debenture is silent as to whether the chargor has this power that the court will turn to examine the charged assets in order to determine whether or not they fall into a category of assets which could sensibly only have been subjected to a floating charge. The judge held that, on a construction of the documents, the debentures in this case created floating charges.

[4.15] Etherton J then went on to assess whether certain transactions were within the ordinary course of the debtor's business so as to fall within its power to deal unilaterally with assets subject to the floating charge. The claimants submitted that a transaction is only in the ordinary course of business if it is part of the common flow of business done by the company. By contrast, the defendants relied on *Re Borax Co* [1901] 1 Ch 326 in arguing that any transaction is within the ordinary course of business if it is not fraudulent, is within the company's memorandum, and is not with a view to the termination of the business. Etherton J regarded both these views as too extreme. He summarised the approach of the courts to this issue (at [227]), saying that it is a mixed question of fact and law which could be approached in two stages. First, the court should consider whether, as a matter of fact, an objective observer with knowledge of the company, its memorandum of association and its business would view the transaction as having taken place within the ordinary course of business. If yes, then, secondly, the court should consider whether, on the proper interpretation of the document creating the floating charge, applying standard techniques of interpretation, the parties nonetheless did not intend the transaction to be regarded as being in the ordinary course of the company's business for the purpose of the charge. Subject to any special considerations resulting from the proper interpretation of the charge document, there was no reason why an unprecedented or exceptional transaction could not, in appropriate circumstances, be regarded as in the ordinary course of business. Likewise, the mere fact that a transaction would, in a liquidation, be liable to be avoided as a fraudulent or otherwise wrongful preference of one creditor over another does not necessarily preclude the transaction being in the ordinary course of business, nor does the mere fact that the transaction was made in breach of fiduciary duty by one or more directors of the company. However, these factors may be among the considerations leading the court to the conclusion that in fact the transaction was not in the ordinary course of business. Finally, Etherton J stated that transactions which are intended to bring to an end, or which have the effect of bringing to an end, the company's business are not transactions in the ordinary course of business.

[4.16] Of particular note are Etherton J's comments regarding disposals of assets covered by the charge which raise money for the continuation of the chargor's business. He suggested that such disposals could be regarded as being in the ordinary course of business in some circumstances (at [202]–[203]). The mere fact that such a transaction had never been carried out before, ie that it was exceptional or even unprecedented, did not mean that it could not be in the ordinary course of business. It might be open to an objective observer with knowledge of the company etc to conclude that it would be in the ordinary course of business for a financially distressed company to raise money in order to continue its business in this way. On the facts of the case Etherton J concluded that the transactions in question had been outside the ordinary course of business of the debtor. However, debenture holders may be concerned about the decision in this case because it suggests that where assets are subject to a floating charge, a wide interpretation will be given to the concept of transactions within the ordinary course of business. (See also [3.41] above.)

Reductions of capital

[4.17] In *Re Hunting plc* [2004] EWHC 2591 (Ch), [2005] 2 BCLC 211 Patten J considered a petition seeking confirmation of the court of a resolution to reduce the issued share capital of H plc. This case is a reminder of the particular vulnerability of preference shareholders. The proposed reduction took the form of a cancellation of convertible preference shares and was opposed by a number of the convertible preference shareholders. Section 135 of the Companies Act 1985 provides that a company may alter its share capital by special resolution, inter alia, by paying off share capital which is in excess of the company's wants (s 135(2)(b)) and then may apply to the court for an order confirming that reduction, which the court will generally give if the resolution is passed appropriately and the court is satisfied that creditors' rights have been appropriately dealt with. The Company Law Reform Bill published in November 2005 introduces a simpler mechanism for capital reductions in private companies which avoids the need for court approval. However, the requirement of court approval will remain for capital reductions in public companies such as H. On the facts here no difficulties existed in relation to the creditors or third parties. The only complaint came from the shareholders whose shares were to be cancelled.

[4.18] On the facts the company had the power in its articles to carry out this reduction. The articles were also explicit as to the rights of the preference shareholders on a reduction of capital, namely to be paid back £1 per share in priority to other shareholders plus any accrued dividends, which sums the shareholders were being paid. In reality the objection of the shareholders was a general one: that this reduction was in some way unfair to them. As Patten J pointed out (at [22]):

‘The problem which has arisen in this case is by no means unprecedented. Preference shareholders are useful to a company at a time of high interest rates because they are obliged to retain their capital in the company at a fixed rate of return prescribed under the terms of the offer, regardless of changes in interest rates in the market. When, however (as in the present case) interest rates are low and capital is therefore available at a more commercial rate of interest, it is not uncommon for the company to decide in its own commercial interests to replace the capital provided by the preference shareholders for capital that is obtainable commercially on the market at a cheaper rate.’

The courts have previously accepted that a company is entitled to effect a reduction of capital for these purposes. A reduction of capital to pay off share capital which is in excess of the company’s wants, set out at s 135(2)(b), is only one example of where a reduction can be utilised. The fact that H did not have capital in excess of its wants was not a bar to a reduction of capital. As Buckley J said in *Re Saltdean Estate Co Ltd* [1968] 3 All ER 829 at 833–834:

‘The fact is that every holder of preferred shares of the company has always been at risk that his hope of participating in undrawn or future profits of the company might be frustrated at any time by a liquidation of the company or a reduction of its capital properly resolved upon by a sufficient majority of his fellow members. This vulnerability is, and has always been, a characteristic of the preferred shares. Now that the event has occurred, none of the preferred shareholders can, in my judgment, assert that the resulting state of affairs is unfair to him.’

It is a proper use of a reduction of capital to disencumber the company from the cost of maintaining preferred shareholdings where it is commercially in its interest to do so. Carrying out the reduction in accordance with the articles did not constitute unfairness to that class of shareholders. Patten J therefore confirmed the reduction of capital. The preference shareholders received £1 per share plus accrued dividends, in accordance with the articles, irrespective of the fact that at the date of trial the shares were being traded at around 118p.

Debt subordination

[4.19] In *Re SSSL Realisations (2002) Ltd* (formerly *Save Service Stations Ltd*) (in liquidation); *Manning v AIG Europe (UK) Ltd*; *Robinson v AIG Europe (UK) Ltd* [2004] EWHC 1760 (Ch), [2005] 1 BCLC 1 Lloyd J heard a case concerning the effectiveness and enforcement of subordination arrangements. In essence, these arrangements seek to enable one creditor to agree not to be repaid until other creditors have been satisfied in full. A company, S, was the parent of a number of subsidiaries, one of which was SSSL. The group traded primarily as retailers of petrol. The supply of petrol to the group gave rise to liabilities to HM Customs & Excise for duty. Another company, AIG, agreed to provide a bond for the duty on behalf of the group to Customs

& Excise. In return, the group companies entered into a deed of indemnity with AIG. The deed contained the subordination provisions which were the subject of dispute in this case. These stated that until all amounts payable by the group companies to AIG under the deed had been paid in full, no group company would prove as a creditor of another group company in competition with AIG, nor receive any payment from another group company. If any payment was received by a group company in breach of these arrangements it was agreed that such a sum would be held on trust for and paid to AIG.

[4.20] There was a substantial inter-company debt due from SSSL to S. SSSL and S both went into liquidation in May 2002. S's main asset was the inter-company debt owed to it by SSSL. AIG argued that, by virtue of the deed, SSSL's debt to S was subordinated to that owed to AIG, so that nothing could be paid on account of the inter-company debt unless and until AIG had been paid in full. This would have the effect that the inter-company debt was also subordinated to that of all other ordinary creditors. There was not enough to pay AIG and the other non-subordinated debts in full, so the inter-company debt would remain unpaid. In turn that meant that there was very little available for distribution in the liquidation of S to its creditors. The liquidators of S argued that the deed was not effective in law, or that its effect could be avoided in a number of ways.

[4.21] This case raises various issues relating to the effectiveness of subordination arrangements. In *Re British and Commonwealth Holdings (No 3)* [1992] BCLC 322 and *Re Maxwell Communications Corp'n plc (No 2)* [1994] 1 All ER 737, [1994] 1 BCLC 1 Vinelott J had established the validity of the concept of the subordination by a creditor of its claims against a debtor. However, doubts as to the validity of these arrangements still persist. It was argued in *SSSL* that the agreement by S to subordinate its claims against the subsidiary was invalid in S's insolvency because it had the end result of infringing the *pari passu* principle which requires the equal treatment of creditors in the liquidation of an insolvent debtor (see Insolvency Act 1986, ss 107 and 328(3) and Insolvency Rules 1986, r 4.181 and *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 2 All ER 390, although see Look Chan Ho 'A matter of contractual and trust subordination' (2004) 19 JIBLR 494). This argument was relevant in this case because *both* S, the junior creditor, and SSSL, the debtor to the junior and senior creditor, were in insolvent liquidation (cf *Re British & Commonwealth Holdings (No 3)* and *Re Maxwell Communications Corp plc*). In effect it was being argued here that, by agreeing that its rights to payment by the subsidiary would be restricted, S had prejudiced its own creditors by making one of its assets unavailable in its own insolvency. Lloyd J rejected this argument. He stated that the *British Eagle* principle relates to arrangements which have the effect of putting the claims of certain unsecured creditors of an insolvent debtor, without their consent, behind the claims of other

unsecured creditors of that insolvent debtor. The principle requires that the available assets of the insolvent debtor, such as they might be, should be used to meet the claims of its unsecured creditors on a *pari passu* basis. The principle has nothing to do with the availability or quality of the assets of the insolvent debtor to meet those claims. In effect, the fact that the asset was impaired by the subordination arrangements agreed by the parent with respect to the insolvency of the subsidiary, was not relevant to the application of the *pari passu* principle.

[4.22] It was next argued that the subordination arrangements resulted in S creating security, by way of charge, in favour of AIG. Lloyd J held that the contractual agreement that S's claims against SSSL should be subordinated to the claims of the AIG did not constitute security. In so far as S also agreed to hold on trust any payment that it received from the subsidiary or any dividend payable in its liquidation, whilst that might create a proprietary right in favour of AIG, in the form of a trust obligation, it did not do so by way of charge. It was accepted that it would create a charge if, but only if, it was construed as applying to all receipts, rather than to sums received up to the amount owed to AIG.

[4.23] Lloyd J also considered whether the liquidator of S might be entitled to disclaim the subordination arrangements as 'onerous property' (Insolvency Act 1986, s 178). Section 178(3) defines 'onerous property' to mean (a) an unprofitable contract or (b) other property which is unsaleable or not readily saleable or which has onerous liabilities attached to it. In light of the definition of 'property' in s 436 of the Act, the judge came to the view that something could only qualify as property within s 178(3)(b) if it involves some element of benefit or entitlement for the person holding it. The obligations of S under the subordination arrangements did not fit that requirement. Accordingly, s 178 could only apply in this case if the liquidator of S could establish that the subordination arrangements constituted an unprofitable contract for the parent. Lloyd J referred to the decision of Chesterman J in *Supreme Court of Queensland in Transmetro Corp Ltd v Real Investments Pty Ltd* (1999) 17 ACLC 1314. In that case the judge, in considering a similar legislative provision, had said that an unprofitable contract was one which imposed on the company continuing financial obligations without sufficient reciprocal benefits. It must give rise to prospective liabilities. A contract is not unprofitable merely because it is financially disadvantageous or because the company could have made a better bargain. Contracts that will delay the winding-up, which will have to be performed over a substantial period of time and which will involve irrecoverable expenditure, are unprofitable. In following this guidance, Lloyd J held that the agreement entered into by S was not an unprofitable contract. Although it was disadvantageous to the interests of S's creditors, it did not impose continuing financial obligations on S, it did not give rise to prospective liabilities, it did not involve expenditure by S, nor did it

require performance over a substantial period of time. Furthermore, S had obtained its reciprocal benefit from AIG in consideration of entering into the agreement.

[4.24] Finally, Lloyd J held that the liquidators of S should not be permitted to cause it to breach its agreement under the subordination arrangements. If necessary, an injunction would have been issued to prevent them taking such action, on the basis that damages would not have been an adequate remedy. In line with the general policy considerations in favour of the enforcement of contractual subordination, this decision therefore helpfully confirms that a subordination agreement is unlikely to be liable to disclaimer by a liquidator of the subordinated creditor.

Insolvency

[4.25] In *Lord (liquidator of Rosshill Properties Ltd) v Sinai Securities Ltd* [2004] EWHC 1764 (Ch), [2005] 1 BCLC 295 Hart J considered two of the avoidance provisions on insolvency, ss 238 and 239 of the Insolvency Act 1986, which deal, respectively, with transactions at undervalue and preferences. These can be difficult provisions to interpret, and indeed this judgment illustrates some of the remaining uncertainties which exist in this area. The liquidator of a company, R, sought to challenge a settlement agreement entered into between two parties who disputed ownership of R. One of those parties (X), who later assigned the benefit of his claims to S, had abandoned his claim to ownership in consideration of an agreement by R to pay to S £6m, which sum was secured by a charge on land owned by R. The value to be placed on this land was uncertain. At the date of the agreement a valuation of about £750,000 was placed on it. However, another valuation which took account of the development potential of the land, but relied on planning permissions which had not been obtained, was £23m. The likelihood of these planning permissions ever being obtained was unclear. The liquidator argued that R had received no, or inadequate, consideration for its agreement, so this transaction was a transaction at an undervalue for the purposes of s 238. Alternatively, the liquidator sought relief under s 239 on the ground that the covenant and its associated charge constituted a preference. S sought an order striking out these applications by the liquidator. Hart J granted the application in part.

[4.26] On the s 238 point, S argued, first, that R had received some consideration. Hart J agreed, accepting that the abandonment of the claims of X must be regarded as *some* consideration which R had received, so that s 238(4)(a) was not satisfied. However, the liquidator also relied on s 238(4)(b), which provides that the transaction is also at undervalue if the consideration received (by R) has a value 'which in money or money's worth, [is] significantly less than the value, in money or money's worth, of the consideration provided by [R]'. Hart J found the

application of this section to the facts more difficult. Hart J acknowledged that there were considerable difficulties in quantifying the value of the consideration received by R and it was at least arguable that the 'hotchpotch of benefits' (at [11]) alleged to have been obtained by R were not capable of being measured in money or money's worth. However, as regards the consideration given by R, although the present valuation of the land was £750,000 and R had creditors in excess of that sum, there was also evidence that a sale of the land without planning permission for £7.5m had been negotiated in the past and it was possible for the liquidator to argue that the land continued to have substantial value. Therefore, Hart J was not prepared to strike out the liquidator's claim on this basis.

[4.27] Next, S argued that even if it were established that there had been a transaction at an undervalue, the court would not be able to make an order restoring the position to what it would have been if R had not entered into the transaction. Section 238(3) provides that where an application has been made by a liquidator in respect of a transaction at an undervalue '... the court shall, on such an application, make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction'. It is accepted that the discretion given by this subsection is wide enough to allow the court to make no order against the other party to the transaction if justice so requires. Hart J accepted that it would not be possible to restore X to his previous position on the facts here. However, he held that the court would not necessarily be deterred from making an order under s 238 simply because it was not possible to restore one of the parties to the position that it had been in before entering into the settlement agreement. It was at least arguable that the court's primary and possibly only concern under s 238(3) was the restoration of R's position; the position of a counterparty needed to be considered by the court as a matter of general discretion but the court was not obliged to ensure that he was restored in every particular to the position he was in before the disputed transaction (at [15]).

[4.28] Section 238(5) provides that the court shall not make an order if it is satisfied that the company did so in 'good faith for the purpose of carrying on its business' (s 238(5)(a)) or that there are 'reasonable grounds for believing that the transaction would benefit the company' (s 238(5)(b)). S next argued that there were no grounds for doubting the good faith of R's directors who approved the transaction. Hart J held on this point that a consideration of whether R had acted in good faith within s 238(5)(a) involved both subjective and objective elements, and that s 238(5)(b) was expressed entirely in objective terms. Alternative means of resolving R's problems were available, such as the appointment of a receiver or provisional liquidators. The liquidator was therefore entitled to maintain a case that the transaction was not necessary for the purpose of carrying on R's business.

[4.29] In relation to s 239, the liquidator had to 'surmount a different obstacle' (at [24]). Under s 238 the transaction at an undervalue is impugnably if made within a period of two years ending with the onset of insolvency (s 240(1)(a)), which was satisfied in this case. This is the same period which applies to a preference given to a person who is 'connected with' the company. In the case of a preference which is not a transaction at an undervalue and is not to a connected person the relevant period is only six months (s 240(1)(b)). In this case the preference, if there was one, was given outside the six-month period and therefore the liquidator needed to show that X was a connected person and, in particular, that he was a shadow director, which, S maintained, he was not. Hart J agreed. X was not a 'person in accordance with whose directions or instructions the directors of R were accustomed to act'. The fact that he had one member of the board as his nominee was insufficient to render him a shadow director. Hart J accepted 'that [this] construction does leave a lacuna: it is difficult to see why a director should be connected but a person who controls a director is not' (at [27]). However, Hart J could not construe the legislation in any other way. Accordingly, the s 239 argument was 'doomed to fail' and was not allowed to proceed, but the liquidator was not shut out of the s 238 application.

Conflict of Laws

PIPPA ROGERSON, MA, PhD (CANTAB)

Fellow, Gonville & Caius College; Senior Lecturer, Cambridge University

Jurisdiction – Brussels 1 Regulation/Brussels Convention

[5.1] Perhaps the most important case this year has been the decision of the ECJ in *Owusu v Jackson (t/a Villa Holidays Bal-Inn Villas Case C-281/02 [2005] 2 All ER (Comm) 577* (see also [3.20] above). It is also the most perplexing and has already given rise to much comment in the English legal journals, some of it vituperative. The ECJ held that the proceedings commenced in England against a defendant domiciled here could not be stayed in favour of proceedings in Jamaica (a non-member state), despite most of the connections of the case being to Jamaica. The dispute arose out of an accident in Jamaica in which the claimant was rendered tetraplegic. All the witnesses to the accident were in Jamaica and the other likely parties to this case were Jamaican, being the hotel owner and so on. At common law, the English court would stay the proceedings against the travel agent to await the outcome of proceedings in Jamaica against the other defendants. That is what the Court of Appeal would have liked to have done. However, the Court of Appeal asked the ECJ for a consideration of the question whether the English court had the power to stay such proceedings. It is clear that within the Brussels 1 Regulation, stays in favour of another member state are not possible. The Regulation provides a complete formula for allocating jurisdiction within the member states. Nevertheless, the English court after *Re Harrods (Buenos Aires) Ltd [1991] 4 All ER 334* has routinely decided that where there is no connection with the EU, other than the domicile of the defendant, a stay of the English proceedings on forum non conveniens grounds is possible in favour of a non-member state. There is no interest of the EU in allocating jurisdiction between a member and a non-member state. It could be argued that these cases do not raise any concerns relating to the internal market.

[5.2] The ECJ disagreed. Any defendant domiciled in a member state 'shall' be sued in that state under art 2; this is mandatory and a defendant has a right to be sued in that jurisdiction or a limited number of other jurisdictions. The ECJ noted that there can be no derogation from art 2 except in the cases expressly provided for by the Regulation. Under the Regulation defendants can only be sued in another member state under the special jurisdictional grounds in sections 2–7 (art 3). There is no provision that a defendant can be sued in a non-member state as there is nothing in the Regulation that refers to the allocation of jurisdiction to

non-member states. Therefore, there are no grounds for a stay of proceedings commenced under art 2. Nevertheless, claimants, whether from within or without the EU, can avail themselves of the Regulation's rules on jurisdiction (*Universal General Insurance Co v Societe Group Josi Reinsurance Co SA* Case C-412/98 [2001] QB 68, [2000] 2 All ER (Comm) 467). Indeed, claimants have a free choice between jurisdiction based on art 2 (domicile of a defendant) or the special jurisdictional grounds. Under the Regulation, certainty is essential for both claimants and defendants but as *forum non conveniens* is inconsistent with that certainty, it cannot be permitted. The ECJ dismissed any argument that a connection with the internal market was necessary (para 34), thus forestalling probable later arguments on the constitutionality of some other Commission proposals in choice of law in contract, etc. This argument in part arose out of the fact that both the claimant and the defendant were from the UK and therefore that the case raised no international relationship. Many other member states have doubted whether the Regulation or an EU interest is called into play in such cases.

[5.3] Several outstanding questions in this matter were not directly answered. Some are still unknowable and in some the answer may be inferred from the result of the case. First, what if there had been proceedings already commenced (perhaps by way of negative declaration) between the Jamaican defendants and Mr Owusu in Jamaica? The ECJ expressly did not deal with this question, saying it had not arisen in this case (para 69). The court was being lazy, the possible effect of a *lis pendens* in a non-member state can only be a case away and the answer is central to the proper understanding of the problem. If the reasoning of the court is as it appears on its face, nothing in the Regulation provides for the effect of proceedings elsewhere and so these cannot be taken into account. The reflexive argument is that one can give a similar effect to proceedings in non-member states as arts 27 and 28 to permit a stay of member states proceedings commenced afterwards so long as they are between the same parties and on the same cause of action. There seems to be no room in the reasoning of ECJ to allow for this pragmatic solution. If that is right, then equally there is nothing in the Regulation to permit a member state's court to stay proceedings in favour of a non-member state where the dispute arises out of one of the exclusive grounds in art 22 (eg land in a non-member state). This must be a wrong result, but it is difficult not to come to this conclusion at first blush. A solution could be found in the special character of some of the jurisdictional bases in art 22, in particular immovable property. Rights in land raise questions of sovereignty and public international law, especially at the enforcement stage, and there is an argument that those questions cannot be sidestepped by an EC Regulation. Subject matter jurisdiction of this kind is strict. That argument is attractive in relation to land and also to entries in public registers; however, the other paragraphs of art 22 do not carry the same public international law limitations. An analogous argument could be

made in respect of a dispute subject to a jurisdiction agreement in favour of a non-member state. This was not answered by the ECJ either. There is nothing in the Regulation suggesting that the jurisdiction agreement should be upheld by a stay of proceedings in a member state commenced in breach of the agreement. A stay must be the right result, however; at least where the jurisdiction agreement is valid, covers the dispute and is interpreted as an exclusive jurisdiction agreement in favour of a non-member state's courts. The difficulty with the reflexive argument in this case is that it might require the jurisdiction agreement to conform to the formal requirements of art 23, for which there is no good reason.

[5.4] Turning to the questions whose answers are more predictable. Although *Owusu* did not expressly cover the case where jurisdiction of the English court has been obtained by virtue of one of the special jurisdictions in sections 2–7, there is no real reason to suppose that the answer would be any different. Reliance could not be directly placed on the wording of art 2. However, given the claimant's free choice between art 2 and sections 2–7 and the ECJ's reliance on certainty for defendants and claimants, it must be the case that there is no power to stay English proceedings against a defendant domiciled in another member state in favour of a non-member state, despite the English court taking jurisdiction on the basis of art 5(1) not of art 2.

[5.5] The difficult questions which could arise out of stays of English proceedings in favour of a non-member state where jurisdiction in England is based upon art 23 were completely untouched. If one of the parties to a properly constituted jurisdiction agreement (even non-exclusive) is domiciled in England, there must be a suggestion that those proceedings once started, cannot be subject to a discretionary stay. Article 23 says that in such a case, the court 'shall have' jurisdiction, which will be 'exclusive unless the parties have agreed otherwise'. Where neither party is domiciled in a member state, art 23 merely prevents other member state's courts from taking jurisdiction, so stay in favour of a non-member state is arguably still permissible. A stay in favour of New York where there is an English jurisdiction agreement may be thought unlikely, but there are circumstances in which the interests of justice have been served by a stay (*Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749, [2002] 1 All ER (Comm) 97; *Bouygues Offshore SA v Caspian Shipping Co* [1998] 2 Lloyd's Rep 461).

[5.6] *Owusu* does not directly affect the rule that the English court can stay proceedings commenced in England by virtue of art 4 in favour of another member state. So that in cases where the defendant is not domiciled in a member state (and none of the exceptions to art 4, including art 27, apply), the English doctrine of *forum non conveniens* can be applied so that proceedings continue in another member state. An example is *Sarrio SA v Kuwait Investment Authority* [1997] 4 All ER 929

(Court of Appeal point unaffected by the House of Lords decision). However, questions remain where defendant is not domiciled in a member state but is a national of one.

Article 5(1)

[5.7] The Court of Appeal in *Mora Shipping Inc of Monrovia, Liberia v Axa Corporate Solutions Assurance SA* [2005] EWCA Civ 1069, [2005] All ER (D) 416 (Jul) affirmed Langley J's decision at first instance ([2005] EWHC 315 (Comm), [2005] All ER (D) 251 (Mar)) that a contract of average guarantee did not oblige the defendants to pay a contribution to general average in England. Therefore, the English court did not have jurisdiction over the various defendants, domiciled in other states of the EU and in Switzerland (a Lugano Convention country). The contract permitted the defendants to pay a contribution either to the shipowner or the average adjuster. The shipowners were domiciled in Norway or Liberia and the average adjuster in England. The parties had agreed that if the obligation was required to be or could be performed in more than one jurisdiction then, after *Besix SA v Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG* Case C-256/00 [2004] 1 All ER (Comm) 521, [2004] All ER (EC) 229, no art 5(1) special jurisdiction was established. So it was only if the place of performance of the obligation to pay was to the adjuster that the English court had jurisdiction. The claimants argued that once the adjuster had asked for payment in London, that became the only place to pay. The claimants could have argued on the basis of the Court of Appeal's decision in *Credit Agricole Indosuez v Chalease Finance Corp'n* [2000] 1 All ER (Comm) 399 but did not even cite it. In that case a choice by one party did fix the performance of the obligation in London but it predates *Besix* and may be incompatible with it. The construction of the obligation in the clause had to be referred to the applicable law, which was treated as being English law. English law has various rules of construction (including natural meaning of words, intention of the parties, surrounding context and so on) but in the end the Court of Appeal came down to the bald advice to contractors everywhere:

'The moral of the story is that if shipowners ... want issues of liability and general average to be determined in England they should include an English exclusive jurisdiction clause.'

That would be a start. However, parties must not place too much faith in jurisdiction agreements along with anti-suit injunctions to be certain of forum following last year's cases in the ECJ (*Turner v Grovit* Case C-159/02, [2004] 2 All ER (Comm) 381, [2004] All ER (EC) 485 and *Erich Gasser GmbH v MISAT Srl* Case C-116/02 [2005] 1 All ER (Comm) 538, [2005] All ER (EC) 517).

Article 6

[5.8] The Brussels regime is apparently simple and straightforward, which paradoxically leads to great uncertainty in complex cases. Insurance disputes often raise difficult matters, as was the case in *Groupeement D'Interet Economique v Zurich Espana* Case C-77/04 [2005] All ER (D) 420 (May). Some cars had been damaged in a car park in France. The claimant insurers had insured the owners of the car park for damage to cars parked there. The owners of the cars had taken out insurance with the defendant. The owners of the car park had undertaken to pay damages to the car owners following proceedings in Spain, and so brought parallel proceedings in France against the claimant for indemnification. The claimant sought to join the defendant as a third party to those French proceedings. It was a case of multiple insurance for the same damage and all the insurers should be party to the indemnification proceedings to ensure a fair division of the insurers' liability. The French court took jurisdiction over the defendant under art 6(2) (third parties), but the defendant argued that the rules in art 11 on insurance applied to deny the French court's jurisdiction. The ECJ dismissed the latter argument swiftly. It noted that the purpose of art 11 was to protect insureds from the stronger economic power of the insurance companies. This was not such a case, as it was between professional insurers. It held that art 6(2) could apply to these third party proceedings but subject to a condition. The ECJ held that art 6(2) required a connection between the various claims in order to ensure that the special jurisdiction was not abused. The wording of art 6(2) is different from that in art 6(1) but the effect of requiring a connection between the claims brings them closer together.

[5.9] *Masri v Consolidated Contractors International (UK) Ltd* [2005] EWCA Civ 1436, [2005] All ER (D) 275 (Oct) was a case on art 6(1). Here the claimant sued in respect of breach of contract. The party to the contract was domiciled in Greece, but the claimant first sued a company which the Greek party owned which was incorporated (therefore domiciled) in England. He then commenced further proceedings against the Greek defendant and other companies that defendant owned and sought to join them to the first proceedings under art 6(1). The Greek defendants protested the jurisdiction of the English court but the English Court of Appeal dismissed the appeal. Article 6(1) permitted jurisdiction to be taken over a defendant domiciled in another member state where he was one of a number of defendants, one of which was domiciled in England. So long as it was expedient to hear and determine these two sets of proceedings together because of the risk of irreconcilable judgments if they were decided in different courts, then the jurisdiction could be taken. This is extremely wide jurisdiction, and the court should be alive to its possible abuse. A merely serious issue to try against an 'anchor' defendant domiciled in England is not a very high hurdle. In this case, the English defendant had tried and failed to have the action against it struck out so

at least there had been some test of the strength of the case against it. The fact that the contract related to a concession in the South Yemen between at least one Lebanese party and had no real connection with England shows the power of the article, now strengthened further by *Owusu v Jackson* (discussed above).

Article 27

[5.10] After *Erich Gasser GmbH v MISAT Srl* Case C-116/02 [2005] 1 All ER (Comm) 538, [2005] All ER (EC) 517, the English courts have been unable to continue proceedings where another member state's court was first seised over the same cause of action between the same parties, even though that action is in apparent breach of an exclusive jurisdiction agreement. Of course, the English court only has to stay its proceedings to await the outcome of the jurisdictional decision of the other court. It is possible that the other member state's court will decline jurisdiction on the basis of the English jurisdiction agreement. However, the decision chafes English lawyers used to abiding by jurisdiction agreements, especially when the 'Italian torpedo' tactic of commencing proceedings in the slow-moving Italian courts is used to frustrate the claim. Innovative lawyers for claimants are now testing the limits of that case by framing the claim in a way which does not involve the same cause of action as the foreign proceedings. In *JP Morgan Europe Ltd v Primacom AG* [2005] EWHC 508 (Comm), [2005] 2 All ER (Comm) 764 that method was partially successful. There were several claims between the parties, arising under a loan contract with an exclusive English jurisdiction agreement and an English governing law clause. Despite that, Primacom had commenced proceedings in Germany with the intention of frustrating possible English proceedings. The claims, inter alia, were for a declaration that the parties to the loan contract, including JP Morgan, were not entitled to interest under the contract and for a declaration that the loan was not yet repayable. JP Morgan then commenced proceedings in England for repayment of the loan and for an injunction to prevent the sale of one of Primacom's assets. Cooke J found himself bound by *Erich Gasser v MISAT* to stay the English proceedings so far as they were for the same cause of action. This term is autonomous (ie it is to be interpreted in the same way in all member states and not in a merely domestic fashion). After the ECJ's decision in *The Maciej Rataj, Tatry (cargo owners) v Maciej Rataj* Case C-406/92 [1995] All ER (EC) 229 and Rix J's decision in *Glencore International AG v Shell International Trading and Shipping Co Ltd and Metro Oil Corp*n [1999] 2 All ER (Comm) 922, the term refers to the dual concepts of *même objet* and *même cause*. These translate into 'the end the action has in view' and 'the facts and rules of law relied on as the basis for the action'. Essentially, the *objet* or end in view of the action is the essential issue raised between the parties to the action. Here the end in view of some of the claims were the same; they all arose out of a determination of the enforceability of various provisions of

interest and repayment in the contract. However, the injunction proceedings were different. Here the end in view was the enforcement of an alleged right to prevent sale of the asset without consent which was not in issue in the German proceedings. This matter could then proceed in the English courts. Splitting up the action in this way is unattractive and will probably lead to irreconcilable judgments. However, it provides a counterbalance to one party's delaying tactics of launching actions in breach of a jurisdiction agreement.

Scope

[5.11] Cases concerning the scope of the Brussels 1 Regulation are becoming more important. *Turner v Grovit* Case C-159/02 [2004] 2 All ER (Comm) 381, [2004] All ER (EC) 485 has prevented the English court from utilising anti-suit injunctions against proceedings in other member states for any matter within the scope of the Regulation. Nevertheless, the English court considers that anti-suit injunctions may be granted against proceedings in another member state's courts where the proceedings fall outside the scope of the Regulation. Arbitration is an exception to the civil and commercial matters and anti-suit injunctions are often granted to prevent proceedings being brought in other member states in apparent breach of an arbitration agreement. In *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Co Ltd, The Hari Bhum* [2003] EWHC 3158 (Comm), [2003] All ER (D) 360 (Dec), the Court of Appeal had robustly dismissed many of the Brussels 1 Regulation arguments. Proceedings in England to enforce the arbitration agreement are not the same cause of action as proceedings in another member state on the substance of the liability and so art 27 does not prevent the English court from taking jurisdiction. In any event, the English court could take its own view of the extent of the arbitration exception. The English court construes that exception widely following the ECJ judgment in *Marc Rich & Co AG v Società Italiana Impianti PA, The Atlantic Emperor* Case C-190/89 [1991] ECR I-3855, [1992] 1 Lloyd's Rep 342 to include matters of what the arbitration agreement covers as well as procedural questions. In the end, in that case, the court decided that the Finnish proceedings were not in breach of the arbitration agreement so the anti-suit injunction was not granted. In *West Tankers Inc v Ras Riunione Adriatica Di Sicurta, The Front Comor* [2005] EWHC 454 (Comm), [2005] 2 All ER (Comm) 240 Colman J granted the anti-suit injunction. He dismissed the evidence that an Italian court would consider this an infringement of its sovereignty as 'irrelevant' where the parties had agreed to arbitrate (following *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87, albeit that that case cannot now be of use for breach of jurisdiction agreements within the EU). He did not clearly deal with the difficult question of the exact reach of the arbitration exception. There must still be an argument that proceedings in Italy on the substantial liability are

not covered by the arbitration exception as they do not primarily concern the excluded matter, arbitration. The fact that arbitration may be raised as a matter of defence to jurisdiction might not be enough to exclude the proceedings from the scope of the Regulation (*Préservatrice foncière TIARD SA v Netherlands* Case C-266/01 [2003] All ER (D) 191 (May)).

Common law jurisdiction

[5.12] The Court of Appeal returned to the question of *forum conveniens* in *Limit (No 3) Ltd v PDV Insurance Co Ltd* [2005] EWCA Civ 383, [2005] 2 All ER (Comm) 347 to remind everyone that the exercise is not a rigid, mathematical formula involving weighing and deciding on the probability of various factors. And also that the trial judge's decision is rarely to be appealed or overruled. This case was really no more than a jurisdictional skirmish over possible liability, where the underlying insured damage arose in Venezuela and proceedings had not yet been commenced in Venezuela. There was very little connection with England apart from the reinsurance having been taken out here, and it was an eminently suitable case for a refusal of permission to serve out as England could not be shown to be clearly the more appropriate forum.

[5.13] CPR 6.20(3) provides a similar basis of jurisdiction in the English court as under art 6 of the Brussels I Regulation. It permits service out of the jurisdiction on a necessary and proper party where a claim is made against someone served (or to be served) within the jurisdiction and there is a real issue which is reasonable for the court to try. This can lead to a wide assumption of jurisdiction against foreign parties and should be subject to a careful test. In *Carvill America Inc v Camperdown UK Ltd* [2005] EWCA Civ 645, [2005] All ER (D) 459 (May) the Court of Appeal had to face, at the early jurisdictional stage, whether the party to be served out of the jurisdiction was a necessary and proper party to proceedings continuing here. Carnwath LJ followed *Petroleo Brasileiro SA v Mellitus Shipping Inc, The Baltic Flame* [2001] EWCA Civ 418, [2001] 1 All ER (Comm) 993 to rely on the old Order 11 cases. The claimant had to show, to the level of a good arguable case, that if the claims would have been heard together if they were brought together in England without the necessity for service out of the jurisdiction. Here the claim for brokerage against the reinsurers was closely bound up with the alternative claims against the reinsured. Although there were different contracts between the three entities, both the practice of the market and the relationships between them suggested that it was good sense to hear the claims all in one action. There was an arbitration clause between the reinsurers and the reinsured. However, as there was no issue in these proceedings between those parties but only between each of them and Carvill, Carnwath LJ was not persuaded that the arbitration rights were affected.

Anti-suit injunctions

[5.14] The English court appears to becoming slightly more reluctant to grant anti-suit injunctions restraining a respondent from continuing proceedings in a foreign country, except in cases where there is a breach of an exclusive English jurisdiction agreement. In *Seismic Shipping Inc v Total E & P UK plc, The Western Regent* [2005] EWCA Civ 985, [2005] 2 All ER (Comm) 515 the Court of Appeal refused to grant an anti-suit injunction over proceedings in Texas despite there being limitation proceedings in England and the accident having happened in the North Sea. The owners of the ship which had damaged the defendants' well head admitted liability but commenced proceedings in England in order to take advantage of the 1976 Convention for Limitation of Liability for Marine Claims brought into force under the Merchant Shipping Act 1995. The defendants had commenced proceedings in Texas, where the claimants' liability would be greater.

[5.15] The Court of Appeal reiterated the principles laid down by that same court in *Royal Bank of Canada v Coöperatieve Centrale Raiffeisen-Boerenleenbank BA* [2004] EWCA Civ 7, [2004] 2 All ER (Comm) 847, which are becoming the touchstone of this area. (1) No one has a right not to be sued in a particular forum, unless some specific factor arises. This could be as an arbitration agreement, jurisdiction agreement or unconscionable conduct on the part of the respondent. (2) There will be unconscionable conduct where the conduct of the foreign proceedings is vexatious or oppressive or an abuse of process of the English court. (3) Concurrent proceedings do not of themselves constitute vexation, oppression or abuse of process. (4) However, the court does recognise the possible unattractive consequences of concurrent proceedings (such as a race to judgment or conflicting judgments). (5) Where the English court is the natural forum and justice does not require that the respondent be permitted to continue in the foreign court, the respondent may be acting unconscionably. However, the court must not deprive the respondent of an advantage in the foreign court of which it would be unjust to deprive him by requiring proceedings only in England. (6) The court must have proper regard to comity and only grant injunctions with caution.

[5.16] There were almost no connections with Texas, and the proceedings there could be said to be forum shopping for an advantage in Texas that was not available in England. England was clearly an appropriate forum, given the location of the accident and the respondent's incorporation here. Texas might be argued to be inappropriate. But the court downplayed these arguments in favour of comity. In particular the English court 'will be reluctant to take upon itself the decision whether a foreign forum is an inappropriate one'. In this case the Texas court had itself stayed its proceedings pending the outcome of the appeal in this

case. To grant an injunction in the light of that admirable respect for comity from an American judge might well be considered counterproductive in the longer run.

[5.17] However, where there is an exclusive English jurisdiction agreement, the English court continues to grant anti-suit injunctions over proceedings brought elsewhere in breach of the agreement. In *OT Africa Line Ltd v Magic Sportswear Corp*n [2005] EWCA Civ 710, [2006] 1 All ER (Comm) 32 the Court of Appeal upheld the exclusive English jurisdiction agreement with an anti-suit injunction over Canadian proceedings, despite Canada being the appropriate forum absent the jurisdiction agreement. In addition, the Canadian judge had held the jurisdiction clause ineffective under Canadian law and was continuing with Canadian proceedings. This clash of jurisdiction led to the possibility of irreconcilable judgments. Nevertheless, the Court of Appeal was unanimously willing to risk that, and the affront to comity, to hold the parties to their bargain.

Domicile and habitual residence

[5.18] In *Mark v Mark* [2005] UKHL 42, [2005] 3 All ER 912 a Nigerian husband contested the jurisdiction of the English court which had been taken on the basis of the wife's habitual residence in England for the preceding 12 months or alternatively on her domicile here (under s 5(2) of the Domicile and Matrimonial Proceedings Act 1973). He argued that she could not be either domiciled or resident here. The wife's presence in this country was unlawful as her leave to remain had expired some two years previously. The argument that unlawful presence prevents habitual residence or domicile in the UK is said to be justified by the public policy of the state but was shattered by Lord Hope of Craighead and Baroness Hale of Richmond. Their Lordships refused to follow obiter dicta in *Puttick v A-G* [1979] 3 All ER 463 which had commended a statement in *Dicey & Morris* that 'a domicile of choice cannot be acquired [in England] by illegal residence' (13th edn, 2001, para 6-037). Baroness Hale agreed with the chief authority on residence, *Shah v Barnet London Borough Council* [1983] 1 All ER 226, to hold that ordinary residence was principally a question of fact. She also agreed with *Ikimi v Ikimi* [2001] EWCA Civ 873, [2001] All ER (D) 107 (Jun) that ordinary residence and habitual residence are interchangeable concepts. However, she held that the meaning of habitual residence is a matter of statutory construction which may depend on the purpose of the statute concerned. She disagreed with the Court of Appeal's decision that the issue was one of public policy. In some statutes lawful residence might be the proper statutory construction (eg those conferring entitlement to some benefit from the state). The meaning can also vary from statute to statute. The purpose of this statute was to provide a close connection between the members of the family and England, sufficient to justify the access to the English courts for matrimonial relief.

[5.19] Unlike habitual residence, where one can have one or more or no habitual residence, one can have only one domicile at any point. A domicile of origin is acquired at birth, from one's parents. However, this can be replaced with a domicile of choice, acquired by the person residing in a country with the intention of remaining there as a resident permanently. Baroness Hale pointed out that domicile as part of a choice of law rule is neutral, it does not work to the advantage or disadvantage of the person affected and its object is to determine the system of law with which the person is most closely connected for matters of personal status (at [44]). The connection can be made despite the person's illegal residence without offending any general principle that someone cannot acquire a benefit from his or her own criminal conduct. Indeed, the state has no particular interest in this connection. This echoes Lord Hope's view of domicile as a private law concept. However, Baroness Hale considered that the legality of the wife's presence in England could be relevant to her intention to remain here permanently. She reiterated that, like residence, the requisite intention is a matter of fact. Therefore, the precariousness of residence as an illegal overstayer might prevent the necessary permanence of intention to reside.

[5.20] This wife had been living in England, albeit with homes in Nigeria and trips to the US, for seven years. She had become an illegal overstayer only in the last two. This must be the right result.

Arbitration

[5.21] The House of Lords in *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2005] 3 All ER 789 reversed the Court of Appeal's decision ([2003] EWCA Civ 1159, [2004] 1 All ER (Comm) 97; considered in All ER Rev 2003 at [5.14]). Their Lordships considered that the arbitrators' error in expressing the award in currencies other than those stipulated in the contract was not an excess of their powers such that the court could intervene in the decision. The arbitrators' decision was, however, wrong. Lord Steyn held that the arbitrators ought to have interpreted the parties' contract in accordance with its applicable law and made the award in the currencies which the parties had agreed upon. Section 48 of the Arbitration Act 1996 must be construed in a businesslike manner and the parties had otherwise agreed in writing to limit the currencies for the payment of damages. This error was either a wrong conclusion of law or fact or an erroneous exercise of an available power, rather than a lack of or excess of power, and did not permit a challenge of the decision under s 68 of the 1996 Act. (See also [2.10]–[2.21] above.)

Choice of law – contract

[5.22] Many choice of law questions arise in a jurisdictional context, often because the applicable law is a ground for the exercise of jurisdiction

in the English court. So in *Marconi Communications International Ltd v Pt Pan Indonesia Bank Ltd TBK* [2005] EWCA Civ 422, [2005] 2 All ER (Comm) 325 the Court of Appeal had to determine what was the applicable law of a contract in order to determine whether the English court could take jurisdiction under CPR 6.20 (see also [3.5] above). The dispute arose out of the rejection for payment of a letter of credit, drawn on the defendant bank. As the parties had not expressly chosen a law to govern the letter of credit, the court had to apply the rules contained in art 4 of the Rome Convention, as enacted in the Contracts (Applicable Law) Act 1990. The letter of credit had been issued pursuant to obligations of the buyer under a contract of sale by which Marconi sold telephone equipment to an Indonesian buyer, expressly governed by English law. The sale contract had provided that the letters of credit were to be 'established and advised' through a bank in London and payment was to be upon presentation of the documents at the advising bank. The bank had argued that the letter of credit was governed by Indonesian law under the application of the presumption in art 4(2). It was the party which had to effect performance characteristic of the contract and it was situated in Indonesia. Marconi argued that the applicable law was English law as the contract was most closely connected with England under art 4(1) and 4(5). The relationship between art 4(2) and (5) has given rise to quite a few cases. The court (giving a composite judgment) followed the most recent (*Land Rover Exports Ltd v Samcrete Egypt Engineers and Contractors SAE* [2001] EWCA Civ 2019, [2001] All ER (D) 394 (Dec)) to hold that the 'presumption should only be disregarded in circumstances which demonstrate "a preponderance of contrary connecting factors" justifying such a course'. The court looked very carefully at all the factors in play in letter of credit arrangements (which involve a number of contracts) and held that the presumption in art 4(2) assumes an ability to identify a single party with characteristic performance. That identification cannot be made in letter of credit cases. The Court of Appeal then concluded that art 4(5) should apply and when the factors were weighed, England was most closely connected. This was in part due to the underlying contract of sale, and in part to the contemplation of the parties to the letter of credit that payment was to be in sterling in London against conforming documents (at [66]).

[5.23] The Court of Appeal again expressly refused to follow the rule in the Netherlands which is only to disregard the presumption where that law has no significance as a connecting factor (*Société Nouvelle des Papeteries de l'Aa SA v BV Machinefabriek BOA* (25 September 1992, unreported)). The diverging law on when to disregard the presumption within the contracting states could be contrary to art 18, which makes uniform interpretation desirable. The European Commission is in the process of making this treaty an EC Regulation ('Rome I', the most recent proposals are found in COM (2005) 650). This provides much more rigid rules on the applicable law in the absence of choice in a new art 4. The

English courts may find that their carefully worked through jurisprudence on this issue is worthless. However, parties should be more inclined to agree an applicable law expressly.

[5.24] These jurisdictional cases are somewhat unsatisfactory as choice of law cases. First, because this question is decided at a very early stage of proceedings, when all the facts are not established and argument can be limited, so the matter is not always the subject of careful investigation. In addition, satisfying the jurisdictional test only needs the applicable law to be identified to the level of a 'good arguable case', rather than the usual civil standard. Secondly, because ultimately the exercise of jurisdiction is discretionary, it can be difficult to disentangle the choice of law from the discretion. However, the point is rarely revisited as part of the substantive liability proceedings once it has been decided in interlocutory proceedings. Therefore, the jurisdictional cases are often the only available authority, albeit questionable.

Choice of law – tort and unjust enrichment

[5.25] The Court of Appeal's decision in *Douglas v Hello! Ltd (No 3)* [2005] EWCA Civ 595, [2005] 4 All ER 128 might have required a determination of some very difficult choice of law issues. First, the characterisation of the issue of the alleged breach of confidence or invasion of privacy. Secondly, the law to apply to determine those issues. Neither was raised by the parties directly. The court concluded, without the benefit of argument, that as invasion of privacy has been 'shoehorned' into breach of confidence, it is not a tort. Apparently, this is because a breach of confidence is not a tort in English law. One does not have to adopt the same characterisation for choice of law purposes as for domestic law (for example, contracts without consideration are still considered under the contract choice of law rule) so it is unfortunate that no explanation was given for this conclusion. Dicey and Morris tentatively suggest that breach of confidence is to be classified as a restitutionary claim, which Lord Phillips of Worth Matravers found 'persuasive', also without explanation. That conclusion was not particularly useful as the connecting factor (which is very vague) for unjust enrichment cases is suggested to be where the enrichment occurred, here England but the court found it important to refer to the conduct in New York. The parties seem to have agreed that publication only in New York would have given rise to no liability (at [99]). The reference to New York law was not, however, to determine whether the wrong was actionable in New York but to determine the reasonableness of the expectation that the information was to be private. As Lord Phillips noted (at [101]):

'If, in the present case, the law of New York had provided that any member of the public had a right to be present at a wedding taking place in a hotel and to take and publish photographs of that wedding, then photographs of the wedding would be unlikely to have satisfied the test of privacy.'

This looks like a *renvoi* of some kind, or some notion of double-actionability. Under traditional analysis, *renvoi* is outlawed in choice of law rules in tort (Private International Law (Miscellaneous Provisions) Act 1995, s 9(5)). There was no need for *renvoi* under the old common law rule of double actionability, as liability under the law of the place of acting was necessary. Maybe there is life in the old dog of *Phillips v Eyre* (1870) LR 6 QB 1 in the context of restitutionary claims?

Consumer Law

C J MILLER, BA, LL.M

Barrister, Emeritus Professor of Law, University of Birmingham

[6.1] The All England Law Reports for 2005 contain relatively few cases in the area of consumer law broadly defined. However, one such case involving the scope of the connected lender liability of s 75 of the Consumer Credit Act 1974 is of considerable practical importance to many consumers and in particular to those who enter into transactions with a foreign element. Another case involving a decision of the European Court of Justice concerning the scope of an exemption from the usual requirements of the Distance Contracts Directive is similarly important. Other cases are perhaps less important, but of sufficient interest to warrant a brief comment.

Consumer credit and the scope of connected lender liability

[6.2] The Consumer Credit Act 1974 is a mammoth and complex enactment, the drafting of which has stood the test of time. It provides very significant protection to consumers, for example, through its licensing requirements, in requiring that information be given in a prescribed form, controlling the advertising of credit, making provision for the cancellation of agreements in certain circumstances, protecting consumers against exorbitant credit bargains and in many other respects. However, the scope of one of the most important and innovatory sections of the Act has long been in some doubt, namely the s 75 provisions for what is usually referred to as a 'connected lender liability', whereby a creditor may be liable for misrepresentations and breaches of contract on the part of the supplier of the goods or services the cash price of which is neither less than £100 nor more than £30,000. The liability of the creditor and supplier is joint and several, but by s 75(2) the creditor is entitled to be indemnified by the supplier in respect of loss suffered by the creditor in satisfying his liability under s 75(1). In other words, in the typical case the assumption will be that it is the creditor and not the consumer who bears the risk of the supplier's insolvency or unwillingness to meet his legal responsibilities. Some of the doubts concerning the scope of s 75 were addressed following an application by the Office of Fair Trading for a declaration in *Office of Fair Trading v Lloyds TSB Bank plc* [2004] EWHC 2600 (Comm), [2005] 1 All ER 843, [2005] 1 All ER (Comm) 354 and the judgment of Gloster J resolved some, but by no means all, of such doubts in a way which will benefit consumers.

[6.3] At the outset it should be noted that what are described in the language of s 12 of the 1974 Act as debtor-creditor-supplier agreements may come in many forms. It is clear in principle, although the point may sometimes have been misunderstood (see *Porter v General Guarantee Corp'n Ltd* [1982] RTR 384), that s 75 does not apply to two-party (hire-purchase) transactions where the creditor and the legal supplier are one and the same person. Indeed, there is no reason why it should do so, since appropriate remedies are provided elsewhere. It is similarly clear that it does apply, within monetary and other limits, to typical 'three-party transactions' where the creditor advances credit to the debtor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier. In such cases the card holder will in due course pay off his debt to the card issuer and the issuer will pay a discounted amount to the immediate supplier. However, there has been doubt about the position in so-called 'four-party transactions' involving merchant acquirers. Gloster J described such transactions in the following terms (at [5]):

'A supplier enters into a contract with a merchant acquirer, which contract obliges the supplier to accept all cards bearing a trademark of the relevant network as payment for goods or services supplied by them to such cardholders. In return, the merchant acquirer agrees to pay the supplier for any such transaction, less a discount. The merchant acquirer recoups his payment to the supplier from the card issuer through a settlement system organised by the network, together with a fee representing a proportion of the discount. The card issuer in turn is paid the supply price in full by the cardholder pursuant to the credit card agreement.'

The several defendants to the proceedings issued credit, debit or charge cards under the major networks, namely the MasterCard, Visa or American Express schemes.

[6.4] In order to resolve the issue, Gloster J had to pick her way through an elaborate labyrinth of statutory definitions which set out the scope of s 75(1). It is not practicable to seek to trace the steps of the definitions in detail, but, very briefly, the requirements which were relevant to the proceedings were that the debtor-creditor-supplier agreement had to fall within s 12(b) of the 1974 Act. This is defined in part as a regulated consumer credit agreement which is 'a restricted-use credit agreement which falls within s 11(1)(b) and is made by the creditor under pre-existing arrangements, or in contemplation of future arrangements, between himself and the supplier'. In turn, s 11(1)(b) states that: 'A restricted-use credit agreement is a regulated consumer credit agreement ... to finance a transaction between the debtor and a person (the "supplier") other than the creditor.' The central plank of the argument for the defendants was that, in four-party transactions, the regulated consumer credit agreement does not finance the transaction between the customer (debtor) and the supplier, since (once the card is accepted) the only person liable to pay the supplier is the merchant

acquirer and not the card issuer. Similarly, it was submitted that in four-party transactions there was no relevant arrangement for the purposes of s 12(b) between the card issuer (creditor) and the supplier, since the supplier's agreement to accept the card is made not with the card issuer (creditor) but with another member of that network whose card bears the network trademark.

[6.5] As Gloster J noted (at [18]), if such submissions were to be accepted, 's 75 connected lender liability would not be invoked in relation to the large number of credit card transactions in the UK that are structured as four-party transactions'. It appears that such transactions represent a very substantial proportion of the whole. In her judgment, it was impossible to distinguish in the real world between three- and four-party transactions and s 75 applied to both. The words 'to finance' in s 11(1)(b) had to be understood as meaning 'provide financial accommodation in respect of' and the card issuer did this by giving the cardholder time to pay for his purchases under the terms of the credit card agreement. Moreover, for the purposes of s 12(b), there were 'arrangements between' card issuers and suppliers, in spite of the lack of any contractual relationship between them, as they were both subject to the rules and settlement processes of the card network. A subsidiary argument based on s 187(1) of the 1974 Act similarly failed. The decision is to be welcomed as corresponding to commercial realities and, it may be assumed, the assumptions of any consumer who uses a credit card with at least a basic understanding of the protection accorded by s 75 of the Act.

[6.6] The second main issue was similarly important for the substantial numbers of cardholders who use their credit cards when travelling abroad or otherwise in circumstances involving a 'foreign element'. An example of the latter type of case would be where goods are bought online from a website established by a foreign supplier and with a view to their being delivered to an address in the UK. Again, it has long been a point of controversy whether s 75 may be relied on in a case of this kind. The Office of Fair Trading was strongly of the opinion that it could and, not surprisingly, this opinion was shared by the major consumer organisations. On the other hand, card issuers denied any legal liability in such cases, but over a period undertook to make *ex gratia* payments up to the amount charged on the card, although not in respect of any consequential losses. In the present case the OFT sought a declaration that s 75 applied to overseas transactions and the defendants argued that it did not.

[6.7] Gloster J dealt with this issue at some length and by reference both to the origins of s 75 in the *Report of the Crowther Committee on Consumer Credit* (Cmnd 4596, March 1971) and to the conflicting views of the principal academic authorities. Her conclusion was that such connected lender liability did not arise in the case of foreign contracts, where the contract between the debtor and the supplier of goods or

services was made wholly outside the UK, was governed by a foreign law, and the goods were delivered or services supplied outside the UK; nor did s 75 apply to contracts where the acts of offer and acceptance were done partly within the UK and partly overseas, and/or the goods were despatched outside the UK for delivery within the UK. The position with respect to variants on such factual situations was left open but, in essence, in the judgment of Gloster J, the reference in s 75(1) to 'any claim against the supplier' was impliedly limited to claims which were enforceable in a UK court.

[6.8] Although many will find this conclusion disappointing, it has to be said that there are persuasive reasons which support it. Undoubtedly, the main one is that the provisions of s 75(2) whereby the creditor can call on the supplier to indemnify him in respect of losses which the creditor has incurred by virtue of s 75, may have little scope for any meaningful application where goods or services are purchased abroad. The defendants gave, by way of example, the payment of hotel bills abroad and the purchase of goods from foreign suppliers over the Internet. As to the latter it was argued (see at [43]):

'If s 75 applies to such transactions, then card issuers will have to bear the liability not only for fraudulent internet transactions, but also for fraudulent foreign suppliers who misrepresent their goods or fail to deliver, with the card issuers in reality having very little influence over local foreign merchant acquirers, other than to attempt to insist upon commercial charge-back provisions where such liability is passed back down the line to the merchant acquirer.'

[6.9] It seems reasonable to assume that in its 1971 report the Crowther Committee did not really have such cases as the above in mind. To this one can add that breach of the supplier's obligations might (as in the case of food poisoning or swimming pool accidents at a hotel) lead to very considerable consequential losses, the original transaction between the cardholder and the supplier would usually be governed by foreign law and that, at least on the view adopted by Gloster J, to accede to the submissions of the OFT would be to give s 75 an extra-territorial effect. As against this, it may be objected that it may be even more difficult for the consumer than for the card issuer to claim against the foreign supplier and that the essential rationale of s 75 is that the card issuer should assume the risk of being unable to recoup such a loss. The arguments are evenly balanced and it is understood that the OFT has sought leave to appeal to the Court of Appeal (see the OFT publication, *Fair Trading*, March 2005, p 1; and see also [3.9] above).

Pawnbroking agreements

[6.10] The decision of Laddie J in *Wilson v Robertsons (London) Ltd* [2005] EWHC 1425 (Ch), [2005] 3 All ER 873 addressed two distinct and somewhat technical points, both of which were again in the broad area of

consumer credit. The first concerned the position with respect to enforceability of antedated agreements and the second the calculation of the total charge for credit.

[6.11] The appellant, Mrs Penelope Wilson, had made extensive use of pawnbroking services over the years and she had also been a claimant in other important proceedings, *Wilson v First County Trust Ltd* [2000] All ER (D) 1943 and on appeal [2003] UKHL 40, [2003] 4 All ER 97, [2003] 2 All ER (Comm) 491. In the present proceedings she was appealing against a decision of Judge Rose and maintaining that certain pawnbroking agreements which she had entered into with the defendant pawnbroker were unenforceable, since they had been backdated so as to create a redemption period of less than the minimum six months required by s 116 of the Consumer Credit Act 1974. Section 116(1) provides that: 'A pawn is redeemable at any time within six months after it was taken.' By s 173 of the Act it is not open to the parties to contract out of this provision. In agreeing with the appellant, Laddie J held that the word 'taken', which triggered the start of the six-month period, referred to the date on which the agreement was entered into by the parties. He also held that the prohibition was absolute and that it was not in point that Mrs Wilson was fully aware of what she was doing or that there was ample consideration for the backdating agreement in the form of a deferment of the debt. As his Lordship explained (at [24]):

'The prohibition on contracting out applies even if there is good consideration and benefits to the borrower for doing so are substantial. What the 1974 Act does is put in place bright lines over which the parties, and in particular the lender, must not step. In particular there is a bright line that the borrower must be given a minimum of six months to redeem. No matter how attractive it may be in the circumstances of a particular case, the parties are not allowed to enter into an agreement like this with less than six months for the redemption period and they are not allowed to contract out of this. That is what has happened here.'

The contrary conclusion would hardly have been consistent with the wording and purpose of s 116(1), taken together with s 173.

[6.12] The second ground of appeal raised what Laddie J described (at [30]) as 'an altogether more difficult point'. It concerned the calculation of the total charge for credit and the requirement in the Consumer Credit (Agreements) Regulations 1983, SI 1983/1553 that this must be stated correctly in credit agreements. If it is not so stated, the consequence is again that the agreement is unenforceable. The problem arose because of a fixed or document fee of £8 which the defendant creditor imposed at the date of signature of the agreement and deducted from the capital sum advanced. So, in effect, Mrs Wilson received £392, rather than the full amount of the loan, £400, but the contract expressed the credit as being for £400 over a six-month period with a rate of interest of 4.5% per month. The question was whether this was correct or whether,

as Mrs Wilson maintained, the document fee should have been excluded in assessing the amount of credit advanced. In this context, it was necessary to consider s 9(4) of the 1974 Act which provides that: 'For the purposes of this Act, an item entering into the total charge for credit shall not be treated as credit even though time is allowed for its payment.' In the judgment of Laddie J, s 9(4) covered (and thus excluded) *all* items entering into the total charge for credit and not only those for which time was allowed for payment. In particular, it covered the document fee which entered into 'the total charge for credit', but was not to be 'treated as credit'. The basic principle that credit has to be treated separately from any charges made for obtaining it is supported by commentary in Professor Sir Roy Goode's *Consumer Credit Law and Practice*, paras 24.144 and 24.155, and the result was that the relevant agreements were unenforceable by virtue of the fact that the total amount of credit had been misstated. The point might be seen as a highly technical one, but there are good reasons why rules for calculating credit should be tightly drawn and rigorously applied. Moreover, as Laddie J noted (at [45]), if document fees cannot be charged it is open to the creditor to achieve his objectives in other ways, for example by a modest increase in the rate of interest charged. However, it should be noted that any such rate must not be extortionate.

Distance contracts

[6.13] The decision of the European Court of Justice in *easyCar (UK) Ltd v Office of Fair Trading* Case C-336/03 [2005] All ER (EC) 834 arose out of a reference from the Chancery Division of the High Court seeking a preliminary ruling in proceedings between the OFT and the easyCar car rental company. The point in issue was a relatively narrow one, but it was of considerable everyday importance. As is well known, easyCar transacts its car rental business via the Internet and thus its contracts are in principle subject to the controls of Directive (EC) 97/7 on the protection of consumers in respect of distance contracts (OJ 1997 L144/19). This Directive has been implemented into UK law by the Consumer Protection (Distance Selling) Regulations 2000, SI 2000/2334. Article 6(1) of the Directive gives consumers the right to withdraw from distance contracts within a limited time-frame without penalty and without giving reasons, and under art 6(2) where this right has been exercised the supplier must reimburse the sums paid by the consumer free of charge, except for the cost of returning the goods. These provisions are reflected in the UK legislation (see, in particular, regs 10, 12 and 14). However, all this is subject to the exception contained in art 3(2) of the Directive (and reg 6(2) of the implementing Regulations) under which the favourable cancellation provisions do not apply to 'contracts for the provision of accommodation, transport, catering or leisure services, where the supplier undertakes, when the contract is concluded, to provide these services on a specific date or within a specific period'. The question

was whether easyCar fell within the scope of this exception and in particular whether the contracts into which it entered were 'for the provision of ... transport'. It argued that it did and they were, the OFT maintained the contrary and in this it was supported by the Spanish, French and UK governments, together with the Commission of the European Communities.

[6.14] Obviously, two views might be taken on the question of what constitutes a contract 'for the provision of transport' within the meaning of the Directive. The narrow view for which there was considerable support is that the expression encompasses only contracts for the provision of transport services whereby persons or things are moved from one place to another by air, ship or road etc. The alternative is that it also encompasses contracts for the provision of the means of transport, for example, in the form of hire cars or, one might add, pre-booked sailing boats. The Directive itself provides no real assistance in indicating which view is to be preferred. In the result, the European Court of Justice favoured the more extensive interpretation for reasons which are on the whole persuasive. First, as it noted (at [23]), the exception encompassed contracts for the provision of 'transport', as opposed to 'carriage', which term would have denoted an activity to be performed by a carrier. Secondly, it found that the wider meaning was supported by the way in which art 3(2) had been translated in various different language versions of the Directive. Thirdly, it regarded (see at [28]–[29]) the rationale of art 3(2) as being that of protecting the interests of the suppliers of certain services in order that they should not suffer the disproportionate consequences which might arise from cancellation of bookings without expense and without the need for explanation. This seems consistent with the other exempted categories covering accommodation and catering and leisure services etc, where last-minute cancellation might often leave the supplier of the relevant goods or services with materials or facilities which could not readily be disposed of at an economic cost.

[6.15] For the above reasons, the court ruled that art 3(2) is to be interpreted as meaning that the exemption for 'contracts for the provision of transport services' includes contracts for the provision of car-hire services. This appears to go further than the opinion of the Advocate General (C Stix-Hackl) (at [62]), who seems to have favoured a case-by-case approach whereby car rental firms would not be exempted, unless in the circumstances they would suffer 'just as severe particular consequences as an undertaking carrying out transport itself'. Plainly, the overall conclusion of the court does not advance the cause of consumer protection in any immediate sense. However, many might argue that if the opposing view had prevailed the financial losses incurred by car-hire firms would no doubt have been reflected in higher overall charges so that the actions of those who cancel without good reason would, in the long term, have worked to the disadvantage of all consumers. In this connection, it should be noted that easyCar's terms of business provided for a refund

where there were exceptional circumstances such as serious illness or natural disaster. Given its apparently competitive prices for early bookings, it is doubtful whether most consumers would expect more than this.

Contempt of Court

C J MILLER, BA, LL.M

Barrister, Emeritus Professor of Law, University of Birmingham

[7.1] The All England Law Reports for 2005 contain several interesting cases in the broad area of contempt of court. They concern such issues as the application of the law of contempt to a juror who discloses matters which have arisen during the course of jury deliberations, together with the associated issue of the appropriate response where there are allegations of jury impropriety; the question whether there is a common law, as opposed to a statutory, power to order the postponement of publication in relation to proceedings; the position with respect to the publication of the proceedings of a mental health review tribunal when it is sitting in public; the right of the press to have access to witness statements when they have not been read out in open court; and the scope of s 13 of the Administration of Justice Act 1960, which provides for appeals in cases of contempt.

Divulging the confidences of the jury room

[7.2] Although it is by no means unprecedented, it is unusual to have a run of decisions of the House of Lords over a relatively short period and in the same broad area. Such has been the position in relation to the application of the law of contempt to situations where there has been a disclosure of the confidences of the jury room in circumstances in which the principal motivation appears to have been a desire to expose perceived impropriety. Linked to this are the closely related questions of the admissibility in evidence of allegations of impropriety and the right of an accused person to a fair trial. In last year's Annual Review the decision of the House of Lords in *R v Connor* and *R v Mirza* [2004] UKHL 2, [2004] 1 All ER 925 was discussed at some length (see All ER Rev 2004 at [7.2]–[7.12]). It established the important point that, contrary to what had been assumed in such cases as *R v Young (Stephen)* [1995] QB 324, s 8 of the Contempt of Court Act 1981 did not prevent the Court of Appeal from receiving evidence which was derived from the deliberations of the jury in the case under appeal and relevant to the disposal of the appeal. Nonetheless, evidence of such matters as were intrinsic to the deliberations of the jury was inadmissible at common law. In relation to this common law rule, Lord Steyn dissented and would have allowed the general rule to be breached where there was 'cogent evidence suggesting a real risk that the jury reached their verdict by a fundamentally perverse process' (at [143]). However, the majority of the

House disagreed and favoured a 'bright line' or blanket rule, subject to the proviso that it would not apply where there were allegations of extraneous influences (as would be the case if a juror communicated with the outside world by using a mobile phone), or, one can add, if the suggestion was that the jurors had not deliberated, but had simply drawn lots, or tossed a coin or, for that matter, had purported to consult an oracle: see, generally, per Lord Hope at [102]–[107]; also *R v Smith* [2005] UKHL 12, [2005] 2 All ER 29 at [16], per Lord Carswell.

[7.3] Section 8 of the 1981 Act was also under consideration in the decision of the House of Lords in *A-G v Scotcher* [2005] UKHL 36, [2005] 3 All ER 1. The relevant provision states that, subject to certain exceptions which have no immediate relevance to the issues under discussion, 'it is a contempt of court to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advanced or votes cast by members of a jury in the course of their deliberations in any legal proceedings'. Perhaps the most obvious examples of disclosures which breach s 8 and constitute a contempt are those which appear in the press and news media more generally. In the instant case the initial disclosure was much more limited. Briefly, Keith Scotcher had been summoned for jury service at Blackfriars Crown Court and, along with other jurors, he had been given a booklet which contained warnings against divulging details of jury deliberations. He was also shown a video which said that it was a contempt of court to disclose the opinions of jurors or the way they voted in their deliberations. At the conclusion of a drugs trial in which he was involved as a juror, the defendants were convicted by a majority verdict. The following day Scotcher wrote to the mother of the defendants with allegations of serious impropriety in the jury room which, he believed, would assist in establishing that the verdicts were unsafe. The letter (which indicated an awareness that it was in contempt of court) claimed, inter alia, that the other jurors had reached their decision on the basis of prejudice and hearsay and had changed their minds late in the deliberations so that they could get home for tea. To add weight to his concerns he had added: 'I was a shop steward ... for 18 years and know how people get framed for things.' The letter concluded with a request that it should not be shown to the police, the judge or prosecuting counsel, but, on the advice of her solicitor, the mother ignored the request and brought it to the attention of the Court of Appeal. The matter was subsequently referred to the Attorney General, who instituted proceedings against Scotcher for contempt of court. The Divisional Court having concluded that a contempt had been committed (see [2003] EWHC 1380 (Admin), [2003] All ER (D) 221 (May)), Scotcher appealed to the House of Lords.

[7.4] The central plank of the appellant's submission to the House of Lords was that a juror is not guilty of contempt of court if he discloses deliberations with the bona fide aim of preventing a miscarriage of justice. Clearly, s 8 of the 1981 Act does not contain any such

qualification but, it was submitted, this should be implied under the interpretative obligation of s 3 of the Human Rights Act 1998 so as to make s 8 compatible with art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the right to freedom of expression) and thereby secure the art 6 right to a fair trial of the defendants to the original criminal proceedings. It would have been surprising if this submission had succeeded and, having referred (at [29]) to the decision of the European Court of Human Rights in *Gregory v UK* (1997) 25 EHRR 577, the House of Lords duly concluded that the restriction imposed by s 8 on art 10 rights was sanctioned by art 10(2) as being prescribed by law and necessary in a democratic society for preventing the disclosure of information received in confidence. Although it was not strictly necessary to the decision, the House also confirmed that the appellant would not have committed a contempt if he had written his letter to the Crown Court or to the Court of Appeal and, going considerably further, Lord Rodger added (at [27]):

‘... if instead of writing to the trial judge or to the appeal court, the appellant had spoken or written to the jury bailiff or to the clerk of court, he would not have been in contempt. Similarly, if he had sent a sealed letter containing his complaint to the defendants’ solicitors or counsel, or even to a citizens’ advice bureau or similar organisation, and had asked them to forward it unopened to the appropriate court authorities, any disclosures in the letter would have been disclosures to the court and so outside the terms of s 8(1). There may be other such cases.’

If, as seems likely, this comes to be accepted, then considerable qualifications will have been read into the straightforward wording of s 8. Whether this is in fact wise may be open to doubt, not least because the receiving court could not have acted on the material since, as noted above, it would have been inadmissible in evidence by virtue of the common law rule illustrated in the cases of *Connor* and *Mirza*.

[7.5] Although it did not raise a question of contempt of court, the decision of the House of Lords in *R v Smith* [2005] UKHL 12, [2005] 2 All ER 29 also provides a further illustration of a case where the background was one of alleged irregularities during jury deliberations. This time the case involved appeals against conviction by defendants who had been convicted on a number of serious charges including kidnapping and murder. During the period when the jury was considering its verdict, the judge was handed a letter which had been written and signed by a juror and which contained a long series of allegations complaining of the conduct of fellow jurors. These included statements to the effect that jurors were being ‘badgered, coerced and intimidated into changing their verdict’, that if the defendants ‘are guilty and we find them innocent they would have got away with it, but if they are innocent and we find them guilty they can always appeal’ and that ‘some of the jurors have behaved disgracefully in trying to secure the verdict they are convinced is the proper one’. The judge discussed the letter with counsel and invited

submissions. Counsel for the prosecution favoured allowing the trial to proceed with a 'powerful direction' to the jurors reminding them of their obligations. Counsel for the defendants agreed and did not seek a discharge, believing that there was a good chance of an acquittal on the most serious charges and thus wishing to avoid a retrial. In the event, the jury convicted on all charges and the conviction was set aside by the House of Lords as being unsafe since the direction was adjudged to have been insufficiently comprehensive and emphatic. The House left open the question of whether, if the direction had been sufficiently strong, it would have been open to the defendants to challenge the conviction by claiming that the jury should have been discharged. In principle, there is much to be said for the view that it should not be open to defendants to 'blow hot and cold' in this way (see the observations of Woolf LJ in *R v Lucas* [1991] Crim LR 844, cited by Lord Rodger at [3]).

[7.6] The brief recital of the extracts from the juror's letter noted above might prompt the reaction that, once they have surfaced, any subsequent conviction should be considered unsafe. However, the difficulty is that one cannot simply take them at face value. For all one knows, any such juror might simply have been a malcontent who was aggrieved at being unable to convince fellow jurors of the correctness of his or her views; and even if it had been permissible for the judge to question the other jurors it is substantially certain that they would have denied the allegations. Hence the inquiry, although not barred by the law of contempt, would, in all probability, have been unproductive. With such considerations in mind, Lord Carswell said of the obligations of the trial court judge (at [20]) that he was 'unable ... to accept that it would have been appropriate for him to question the jurors about the contents of the letter, let alone that he was obliged in law to do so'. He added (at [21]):

'If the jury were questioned as a body, it is not very likely that the members against whom misconduct was alleged would be willing to admit it, and there could be a conflict of evidence which would be very difficult to resolve ... I accordingly consider that questioning the jurors, even if it were within legitimate bounds, would have been likely to make the situation worse rather than better.'

[7.7] *R v Momodou* [2005] EWCA Crim 177, [2005] 2 All ER 571, although mainly of interest for its comments on the inappropriateness of witness training (as opposed to familiarisation), also raised issues of alleged impropriety on the part of jurors. The background was a trial arising out of a violent disorder at an immigration detention centre and a written complaint to the judge which was made by a juror after the jury had retired and which alleged that two fellow jurors had been behaving in a discriminatory and prejudiced manner. In dismissing an appeal against conviction, the Court of Appeal observed (at [76]) that:

'The judge could not ignore the allegation. However it would have been unreasonable for him to discharge the jury simply because such an allegation

had been made. So he investigated it, as best he could given the confidentiality of jury deliberations, with the only people who could know whether any jurors were indeed expressing themselves in discreditable language or approaching their responsibilities in dereliction of their duty.'

The form of the investigation was that the judge had discussed the issue with counsel, called the jury back into court, provided them with an edited copy of the letter he had received, asked whether they could continue to deliberate impartially and made it clear that he could not be told how the deliberations in relation to any individual defendant were proceeding. After deliberating privately for about an hour, the jury had responded by writing, *inter alia*: 'We take our oaths seriously and know that we can try this case fairly and impartiality.' Thereafter, the judge had repeated his instructions that the jurors must put all prejudice aside and the jury had indeed acquitted some of the defendants on various charges. In the result, the Court of Appeal concluded that the judge could not be criticised for the way he had handled the issue and it plainly thought it unnecessary and also, it may be assumed, inappropriate for him to have explored the issues with individual jurors. It is submitted that this must surely be correct and that any additional requirements would have been unrealistic.

Postponing the publication of proceedings

[7.8] At common law there has always been an element of doubt as to whether a court has a general power to order that the reporting of proceedings held in public be postponed in the interests of securing a fair and unprejudiced trial. It was not disputed that a judge could properly request that this be done, or warn the press and news media more generally that any such publication before the danger had passed might constitute a contempt of court by virtue of the risk of prejudice which it was subsequently adjudged to have created. Such a contempt would be under what has historically been referred to as the sub-judice rule or, more recently in the United Kingdom, the 'strict liability rule' of the Contempt of Court Act 1981. The question the answer to which was in doubt was whether non-compliance with the (purported) order would *of itself* constitute a contempt of court.

[7.9] In the United Kingdom the above issue is unlikely to be of practical importance since the enactment of s 4 of the Contempt of Court Act 1981. This is because the general rule whereby it is lawful to publish a fair and accurate report of legal proceedings held in public (see s 4(1)) is qualified by s 4(2), which enables a court, 'where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, [to] order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose'. It now appears to be accepted that breach of such an order would, without more, be a contempt of court,

unless, perhaps, it could be shown that the court's perception of the necessity for the order was manifestly unreasonable. However, in at least most other common law jurisdictions there is no statutory equivalent of s 4(2) and if the power is to exist at all it must lie within the common law

[7.10] The above issue was addressed in *Independent Publishing Co Ltd v A-G of Trinidad and Tobago* [2004] UKPC 26, [2005] 1 All ER 499. The background was a high-profile trial in Trinidad and Tobago for the brutal murder of four members of a family by, it was alleged, a notorious drug dealer and nine others. The proceedings were preceded and accompanied by publicity which was later described by a judge of the local Court of Appeal as 'sensational, unremitting and scandalous'. Leading counsel in the case were concerned about the position of one of the accused who had indicated that he would plead guilty and testify against his co-accused in return for a presidential pardon which would commute the mandatory death sentence to one of life imprisonment. The concern led Jones J to make an order 'that the media, both printed and electronic for the time being and until further order, refrain from publishing, referring to or commenting on in any way the matters in this court which relate to [that accused] and, in particular, to his plea or to the sentence imposed by this Court'. The orders were challenged on the ground that they violated the constitutional right to freedom of expression, but upheld by the local courts, whereupon the matter went on further appeal to the Privy Council. In an opinion which was delivered by Lord Brown, the Privy Council concluded that the main authority which is usually cited in favour of the power, *R v Clement* (1821) 4 B & Ald 218, 106 ER 918 and subsequently (1822) 11 Price 68, 147 ER 404, provided too insecure a foundation on which to rest the existence of an inherent power to make such an order. Accordingly, the claimants were entitled to relief in the form of a declaration that the right to freedom of expression should not be contravened by non-publication orders made in excess of the court's jurisdiction.

[7.11] The Privy Council's conclusion is surprising for a number of reasons. First, it appears to have accepted that, even at common law, there were situations in which the reporting of proceedings heard in open court must be postponed or, as the case may be, desisted from. This was true of cases where there had been a 'trial within a trial' to determine the admissibility in evidence of, for example, previous convictions or an alleged confession and of cases where a witness had been accorded anonymity, as in trials for blackmail. To this one can add situations where a newspaper reveals that an accused who is currently on trial for certain offences has at the outset of the proceedings pleaded guilty to other charges. Such was the case in *R v Border Television Ltd, ex p A-G* (1979) 68 Cr App Rep 375 (a case which pre-dated the 1981 Act), where pleas had been entered in the absence of the jury and a contempt was committed when this was revealed. (See also *A-G v Associated Newspapers Ltd* [1999] COD 190: a Dockland bombing case, where the

revelation occurred when the jury was considering its verdict.) In all such cases the contempt did not depend on the making of an order even if there were power to make such an order. The Privy Council distinguished the ‘trial within a trial’ and the witness identity cases on the basis that what they had in common ‘is that the court has made an order directly affecting the conduct of the proceedings before it ... and that the press thwart the evident object of such orders at their peril’ (see at [25]). Yet it is difficult to see why the due administration of justice is more deserving of protection in such cases than in others, for example, where an indictment has been severed to avoid prejudice to the accused or a third party, or because a single trial of all pending charges would be too onerous. Such situations are now within s 4(2) of the 1981 Act, but it is by no means obvious why, on appropriate facts, an order requiring the postponement of reporting should not have been seen as a proportionate response at common law to the danger that reporting would otherwise prejudice the forthcoming trials.

[7.12] Secondly, the Privy Council does not mention a long series of cases where there is a well-developed common law jurisdiction to issue orders which are binding *contra mundum* or on the world at large and with the purpose of shielding children from publicity which is perceived as being detrimental to their best interests. These are illustrated by *X County Council v A* [1985] 1 All ER 53 (the Mary Bell case) and such other important decisions as *Re Z (a minor) (freedom of publication)* [1995] 4 All ER 961, where the background was the shielding of the identity of a child who had special educational needs. Obviously, the situation is in one sense far removed from the one which was before the Privy Council and the jurisdiction is not without its critics. However, the cases illustrate that the making of orders which are binding on all who have knowledge of them is not without precedent.

Publicity and mental health review tribunals

[7.13] The decision of Beatson J in *R (on the application of Mersey Care NHS Trust) v Mental Health Review Tribunal* [2004] EWHC 1749 (Admin), [2005] 2 All ER 820 is one of a number of cases which have involved Ian Brady in his capacity as a restricted patient at Ashworth Hospital. On this occasion he had requested that the statutory review by a mental health review tribunal of his continued detention be heard in public and the request had been granted by the tribunal in reliance on r 21(1) of the Mental Health Review Tribunal Rules 1983, SI 1983/942. Rule 21 is headed ‘*Privacy of proceedings*’ and it provides in part that: ‘(1) The tribunal shall sit in private unless the patient requests a hearing in public and the tribunal is satisfied that a hearing in public would not be contrary to the interests of the patient.’ It appears that public hearings in such tribunals are wholly exceptional and the claimant argued in an

application for judicial review that the tribunal's decision was flawed, *inter alia*, by reason of errors of law as to its powers to control the publicity given to proceedings held in public.

[7.14] It has long been clear that a mental health review tribunal is a 'court' for the purposes of the law of contempt: see *Pickering v Liverpool Daily Post and Echo Newspapers plc* [1991] 1 All ER 622. However, the principal distinction between private and public hearings before such tribunals lies in the application of s 12 of the Administration of Justice Act 1960. Where the tribunal is sitting in private, s 12(1)(b) of the Act will apply and it provides in effect that, by way of exception to the general rule, the publication of information relating to proceedings before such a tribunal shall 'of itself' be a contempt of court. This is a straightforward uncomplicated provision. In the small number of cases where hearings are held in public, s 12 of the 1960 Act does not apply and the main source of control lies in the 'strict liability rule' of the Contempt of Court Act 1981. This applies only where the relevant proceedings are 'active' (s 2(3)) and the publication creates 'a substantial risk that the course of justice in the proceedings ... will be seriously impeded or prejudiced' (s 2(2)). Given the composition of such a tribunal, and the fact that much of the evidence is likely to be that of experts, it would presumably be very rare for this test of liability to be met. A further provision in r 21(5) of the 1983 Rules states that: 'Except in so far as the tribunal may direct, information about proceedings before the tribunal and the names of any persons concerned in the proceedings shall not be made public.' It will be noted that this does not specify whether it applies both to private and public hearings.

[7.15] In the course of a lengthy and detailed judgment, Beatson J concluded (at [50]) that r 21(5) covered both public and private hearings. Nonetheless, in his judgment the tribunal had erred in its assessment of the powers it would have to prohibit or restrict press reporting of a public hearing and in apparently assuming that the summary set out in the *Pickering* case applied to public as well as to private hearings. It was also by no means clear that it had appreciated the real difficulties of enforcing restrictions on publicity when proceedings were held in public. Such errors having affected its assessment of whether a public hearing would be contrary to Brady's interests, the application was granted, the decision set aside and remitted for a rehearing. Presumably, one result of the decision will be that public hearings before such tribunals will become even rarer than is currently the case. Whether this is desirable is a matter on which opinions will differ. On one view, it may be said that private hearings are preferable as safeguarding the privacy of highly vulnerable individuals even, and perhaps especially, when they have acquired a degree of notoriety, as in the case of Ian Brady. As against this, it may be argued that there is something distinctly uncomfortable about the notion of decisions affecting the freedom of such individuals being sheltered from publicity and public scrutiny.

Press access to witness statements

[7.16] Another issue relevant to open justice and access to matters raised in judicial proceedings came before Park J in *Re Guardian Newspapers Ltd* [2004] EWHC 3092 (Ch), [2005] 3 All ER 155. The issue arose in the context of litigation between a Singapore businessman by the name of Mr Chan and Alvis Vehicles Ltd, a manufacturer of military vehicles. After some eight days of the hearing during which witnesses gave evidence-in-chief by confirming their witness statements, the case was adjourned and then settled under the usual confidential terms. A short time thereafter, a reporter at the *Guardian* newspaper who had taken an interest in the case requested that he be permitted to inspect and copy various witness statements and documents in the claim, believing them to be potentially newsworthy. Alvis objected and it fell to Park J to consider whether the newspaper was entitled to have access to the materials.

[7.17] Entitlement was claimed under three heads of argument. First, reliance was placed on CPR 32.13(1), which provides: 'A witness statement which stands as evidence in chief is open to inspection during the course of the trial unless the court otherwise directs.' On the face of it, this did not apply once the trial was over and Park J so held. Secondly, it was argued that a court could grant access under the inherent jurisdiction, but Park J was unwilling to act under this head where there were specific provisions which were more obviously in point. Thirdly, reliance was placed on CPR 5.4(5) which provides that any person other than a party to proceedings may: '(a) unless the court orders otherwise, obtain from the records of the court a copy of—(i) a claim form ... (ii) a judgment or order ... (b) if the court gives permission, obtain from the records of the court a copy of any other document filed by a party, or communication between the court and a party or another person.' This covered the important elements of what the newspaper was seeking and in particular the witness statements as being part of the 'records of the court'. Having disposed of a submission, which appears to have had little merit, that after the conclusion of the proceedings there was no 'court' which could give permission, Park J turned to consider whether permission should be granted. He concluded that it should and for reasons which are entirely persuasive. These ranged from the desirability of adherence to the principles of open justice, the increased use of written materials in court and the general trend of modern decisions. Perhaps the most persuasive reason of all was that, if the contents of the witness statements had been put in evidence through oral question and answer, they would have been recorded in a transcript which the newspaper would have had an absolute right to purchase on payment of the relevant charges. This being so, it would hardly be right for access to the same information to be diminished because of the (sensible) modern time-saving practice of the judge reading such materials out of court. As his Lordship observed (at [34]), it may have been quite understandable that Alvis was unhappy about the application, but the proceedings between the parties were not a private

arbitration. Litigation involves a cost and it includes the publicising of material which the parties might prefer to keep secret.

Arbitration proceedings

[7.18] By way of contrast with the above case, the proceedings in *Glidepath BV v Thompson* [2005] EWHC 818 (Comm), [2005] All ER (Comm) 833 involved proceedings which, although begun by claim form, had been stayed to arbitration pursuant to s 9 of the Arbitration Act 1996 and by way of a consent order. The applicant, who was not a party to the agreement to arbitrate, was seeking access to certain documents which pre-dated the consent order and which he wished to use in proceedings before an employment tribunal. The test for granting permission for access to the court file was, in the words of Colman J (at [25]), whether such access was 'reasonably necessary to protect or establish the legal rights which he seeks to enforce in the proceedings before the employment tribunals or otherwise in the interests of justice'. His Lordship held that the applicant had not satisfied this requirement, adding (at [28]):

'It is important that the courts do not allow vague principles of open justice to cause them to pay mere lip service to the confidentiality of arbitration proceedings, while permitting inroads into that regime, unless it is really necessary to give access in the interests of justice.'

The decision seems to be entirely justifiable on the facts, not least because all the relevant documents, which included applications for a freezing order and a *Norwich Pharmacal* disclosure order, were engendered in the course of applications made in private and not in public.

Appeals in cases of contempt of court

[7.19] Finally, reference may be made to the decision of the Court of Appeal, Criminal Division in *R v Serumaga* [2005] EWCA Crim 370, [2005] 2 All ER 160. The background was that the appellant was the estranged husband of one Zine Ndudane, who had been charged with unlawfully wounding him and with criminal damage to his property. He was to be a principal witness at her trial, which was listed in Croydon Crown Court, but he did not attend, whereupon Judge MacRae granted a warrant for his arrest. Following a subsequent relisting, which the appellant again did not attend, the court log recorded the following entry: 'If witness arrested when Judge MacRae on leave, prosecution may want to have him remanded in custody until judge returns from leave.' Some time later and when Judge MacRae was on leave the appellant was duly arrested and brought before Judge Joseph who, after a short hearing, refused bail and remanded him in custody until the day of Judge MacRae's anticipated return some seven days later. This prompted an immediate application to the High Court for judicial review, which was refused on the ground that an appeal to the Criminal Division of the Court of Appeal was the appropriate remedy. Thus, via this circuitous

route, the Court of Appeal was seized of the matter and, as Maurice Kay LJ noted (at [6]), the procedural and jurisdictional uncertainties followed in the wake of the abolition by s 17(3) of the Criminal Justice Act 2003 of the right to apply to a High Court judge in chambers for bail.

[7.20] The principal point of interest in the case was the scope of s 13(1) of the Administration of Justice Act 1960, under which an appeal lies ‘from any order or decision of a court in the exercise of jurisdiction to punish for contempt of court (including criminal contempt) ...’ Section 13(2) further provides that: ‘An appeal under this section shall lie in any case at the instance of the defendant and, in the case of an application for committal or attachment, at the instance of the applicant; and the appeal shall lie ... (bb) from an order or decision of the Crown Court to the Court of Appeal ...’ On one view, s 13(1) would apply only where the relevant ‘order or decision’ was one which imposed a punishment for contempt of court. However, the court adopted a broader interpretation, whereby the expression was treated as being ‘sufficiently wide to relate also to orders or decisions made in the course of proceedings which may result in a conviction of and sentence for contempt’. This included an application for bail. Maurice Kay LJ explained the reasoning of the court as follows (at [12]):

‘The statutory language permits it. It provides a remedy in a case of unjustifiably prolonged custody, and it does so without impinging on cases where the allegation is of an offence other than contempt of court. Moreover, there are exceptional features which surround summary proceedings for contempt which, as the authorities make clear, demand an enlarged process of judicial scrutiny.’

These considerations were seen as outweighing the slight risk of burdening a busy court with unmeritorious applications which could not be filtered out by a requirement of leave. Moreover, an appeal against the refusal of bail was seen as being a more satisfactory remedy than an application for judicial review. In the result, the appeal was allowed and bail was granted subject to conditions and with the comment (at [14]): ‘We do not find any circumstances which would justify the withholding of bail in this case.’

[7.21] It is submitted that the overall result of the case is satisfactory, as is the court’s evident lack of sympathy with what had occurred at an earlier stage. Having referred to the observations of Hale LJ in *Wilkinson v S* [2003] EWCA Civ 95, [2003] 2 All ER 184, which emphasised the need for such processes to be completed expeditiously but fairly, Maurice Kay LJ said with reference to the facts of the present case (at [7]):

‘We are bound to say that we have seen and heard no material which would have justified the delay of at least seven days, which was the inevitable consequence of awaiting the return of Judge MacRae (assuming that the appellant was to remain in custody). In *Wilkinson’s* case the Court of Appeal

(at [22]) considered a delay of less than half of that time to be “the very limit of what could be either lawful or acceptable’.

One is tempted to say ‘quite so’.

Contract

MICHAEL FURMSTON, TD, BCL, MA, LL.M

Bencher of Gray's Inn, Emeritus Professor of Law and Senior Research Fellow, University of Bristol

Terms

[8.1] The decision of the House of Lords in *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 All ER (Comm) 1 is of major importance in the law of Carriage of Goods by Sea (see [22.13]–[22.19] below) but it is also of interest to general contract lawyers. In this case, the contracts between the parties were contained in bills of lading and/or charterparties, both of which were subject to English law. The bill of lading was necessarily subject to the Hague-Visby Rules and the Hague-Visby Rules were expressly incorporated in the charterparty. Article III, r 8 of the Hague-Visby Rules and of their predecessor the Hague Rules provide:

‘Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect.’

[8.2] The shippers and consignees sued the carriers on the basis that the cargo had been damaged by rough handling during loading and/or discharging. The answer of the shipowners was that the charterparty transferred the duty to load and unload the cargo to the shippers and consignees by cl 17 of the charterparty which provided:

‘17. Shippers/Charters/Receivers to put the cargo on board, trim and discharge cargo free of expense to the vessel.’

The central argument of the claimants was that the Hague-Visby Rules do not permit the contractual exclusion of liability for carriers loading or unloading. The carriers argued that the rules did permit a contractual allocation of who was to be bound to load or unload and that this is what the charterparty did. In other words, the rules were mandatory as to the duty but not as to the scope of the duty so that the parties could agree who was to assume liability for loading and unloading. An argument of this kind had been accepted by the House of Lords in *GH Renton & Co Ltd v Palmyra Trading Corp of Panama* [1956] 3 All ER 957. In effect, in the present case, the House of Lords were being invited to overturn the *Renton* case.

[8.3] It is clear that there are plausible linguistic arguments in both directions. Some of the duties imposed by the Hague Rules, such as that as to seaworthiness, can certainly not be excluded by agreement. On the other hand, loading is often the subject of arrangements by the cargo owners who deal with the stevedores who actually do the work. In such circumstances, there are obviously plausible arguments that the shipowner should not be liable for the carelessness of the stevedores who have been engaged by someone else and over whom they have no control.

[8.4] The question has of course arisen in other jurisdictions. The House of Lords' position has been followed in Australia and New Zealand and in India and Pakistan but the contrary view has been taken in France and, in a number of decisions of Circuit Courts of Appeal in the United States.

[8.5] The leading judgment given by Lord Steyn clearly sets out the possible contending views for coming to a correct analysis of the effect of the Hague Rules without coming to any clear conclusion as to which view is correct. The speech is, however, clear that in the circumstances it would not be appropriate for the House of Lords to overturn its own earlier decision. If the rule about the contractual allocation of duty of loading and unloading is to be altered, this should better be done in the context of an overall review of the rules about carriage of goods by sea of the kind which UNCITRAL is currently carrying out.

[8.6] *Mitsubishi Corp v Eastwind Transport Ltd* [2004] EWHC 2924 (Comm), [2005] 1 All ER (Comm) 328 is another case involving exemption clauses in a carriage of goods by sea context but in this case the contract was not subject either to the Hague Rules or to the Unfair Contract Terms Act 1977 (see also [22.20]–[22.22]). The claimant was allegedly the holder of a number of bills of lading relating to the shipment on board the defendant's vessel of a large number of cartons of frozen chicken parts. It was alleged that the goods, which had been in good order when shipped, had been damaged during transit and that the defendants were liable. The defendants relied on a wide exemption clause in the bill of lading. The claimants sought to argue that the clause was so wide that if it was given effect it would deprive the contract of any content, leaving the defendants with no obligations.

[8.7] The effectiveness of the exemption clauses was considered as a preliminary point. Ian Glick QC held that the words of the exemption clause, though wide, were not so wide as to deprive the contract of any content. It would be very unusual for a clause to have this effect because the court would usually read the clause in such a way as to avoid absurd results and give effect to what it saw as the intention of the parties. The appropriate course was to consider the alleged breaches and to see whether they were covered by the specific words of the clause. If they were, the clause could be given effect, even though it might be possible to imagine other breaches where the effect of the clause was more debatable. It was clear, for instance, that the wording was not wide enough to cover

dishonesty by the defendant. The clause shifted most of the risks of damage to the goods but that was perfectly permissible at common law in a contract where the parties were free to insure the risks which the contract allocated.

[8.8] *Frans Maas (UK) Ltd v Samsung Electronics (UK) Ltd* [2004] EWHC 1502 (Comm), [2005] 2 All ER (Comm) 783 is a useful authority on the scope of reasonableness under the Unfair Contract Terms Act 1977. In this case the claimant, a warehousing concern, sued the defendants, electronics manufacturers, for unpaid services. The defendants counterclaimed for the loss of goods warehoused with the claimant. This counterclaim became in practice the sole subject of the action between the parties. A very large quantity of mobile telephones was stolen from the warehouse in circumstances which very strongly pointed to being an inside job. The dispute was whether or not the claimants were covered by the contract for employee default. The judge held that the contract was governed by the British International Freight Association (BIFA) standard terms. Clause 27(A) of these terms contained a limitation of the liability of the claimant. Gross J held that there was no reason not to construe the words in their natural sense as being wide enough to cover employee default (short, no doubt, of fraud by the employer). This is an application of a principle which has been accepted in England, but not in Australia, that there is a significant difference between clauses which seek to exempt liability altogether and ones which limit liability. The force of this point must depend to some extent on the limit which is put. If the limit were, as in the present case, say £25,000, one would wonder whether there was any real difference in the context of a theft of goods worth nearly £2.4m between such a limitation clause and an exemption clause. In such a case, the real question must be who should insure? The judgment reveals that Samsung said that the claim was one by way of subrogation which presumably means that their insurance covered the loss but it is not clear from anything in the judgment whether the loss was also covered by the claimant's insurance policy. In a case of this kind where the loss is wholly financial and ought to be insured by somebody, the most important point is surely that both parties know whose job it is to insure. The account given by the judge of the parties' negotiation of the contract certainly does not suggest that they had this clearly in mind at the time.

[8.9] The judge also held that in the circumstances to limit liability in this way was reasonable within the scope of s 3 of the Unfair Contract Terms Act 1977. It is clear here that the parties were of equal bargaining power or, indeed, if there were any conflict, Samsung were the more powerful. If Samsung had refused to accept any limitation of liability, it seems doubtful that Maas would have turned the goods away but no doubt they would have charged more. In any case, the conditions offered the option of higher limitation at a higher price.

Construction

[8.10] Cases involving the construction of contracts have always made up a substantial part of contract litigation but in the last few years there has been much more elaborate discussion of the process. The questions of construction involved in *Sirius International Insurance Co (Publ) v FAI General Insurance Ltd* [2004] UKHL 54, [2005] 1 All ER 191, [2005] 1 All ER (Comm) 117 would probably not have come before the House of Lords had it not been that at the time of application for leave to appeal there appeared to be a broader question of the autonomy of letters of credit which, by the time the appeal was heard, had effectively disappeared. The question of construction was in fact very difficult, since the trial judge and three members of the House of Lords took one view and the Court of Appeal and two members of the House of Lords took a different view (though in the circumstances the two members of the House of Lords did not think it necessary to articulate their reasoning or to dissent). The question involved the construction of the settlement contained in a Tomlin order, together with the meaning of the side letter to a letter of credit. The details may perhaps be left on one side for present purposes but the approach to be adopted was clearly set out in para [18] of Lord Steyn's speech, in which he said:

'The settlement contained in the Tomlin order must be construed as a commercial instrument. The aim of the inquiry is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. The inquiry is objective: the question is what a reasonable person, circumstanced as the actual parties were, would have understood the parties to have meant by the use of specific language. The answer to that question is to be gathered from the text under consideration and its relevant contextual scene.'

[8.11] It is likely that future generations will often want to cite the discussion of what is literalism contained in part of para [19] of the judgment. Lord Steyn said:

'The tendency should therefore generally speaking be against literalism. What is literalism? It will depend on the context. But an example is given in *The Works of William Paley* (1838 edn) vol III, p 60. The moral philosophy of Paley influenced thinking on contract in the nineteenth century. The example is as follows. The tyrant Temures promised the garrison of Sebastia that no blood would be shed if they surrendered to him. They surrendered. He shed no blood. He buried them all alive. This is literalism. If possible it should be resisted in the interpretative process.'

(See [3.28] above for further discussion.)

[8.12] The first quotation from Lord Steyn above was cited to the Court of Appeal in *Royal and Sun Alliance Insurance plc v Dornoch Ltd* [2005] EWCA Civ 238, [2005] 1 All ER (Comm) 590 but the court did not think the case was one of literal interpretation but rather of trying to make

sense of a decision by the parties to incorporate a standard term into a type of contract for which it was not well suited.

[8.13] The claimant was part of a consortium which provided insurance to the Coca-Cola Company, its directors and officers relating to claims made against them. The policy was reinsured with the defendants. The reinsurance policy contained a claims control clause which provided: '(a) The Reinsured shall upon knowledge of any loss or losses which may give rise to claim under this policy, advise the Underwriters thereof by cable within 72 hours.' Claims were made against Coca-Cola by investors who claimed that Coca-Cola had made false statements which had caused the investors to buy the shares at artificially inflated prices. The claimant knew of the existence of the complaints by 12 December 2000 but did not tell the defendants until 19 January 2001. The defendants denied liability.

[8.14] Clauses requiring the reporting of claims are of course commonly to be found in both insurance and reinsurance policies. As Longmore LJ pointed out, in the situation where a fire has recently taken place or a cargo is rotting on the quayside, prompt reporting is clearly desirable. In the present case, the need for a draconian requirement of reporting was much less apparent. The Court of Appeal thought that the key to the construction of the clause was the meaning of the words 'loss or losses'. It was apparent that at the time when the claim was reported to the defendants, neither the claimant nor anyone at Coca-Cola had suffered any actual loss and, indeed, they were not likely to do so, even if the claims against Coca-Cola were successful for a considerable time. In order to produce the results desired by the defendants, it was necessary to insert some word such as 'alleged' before the word 'loss'. This the Court of Appeal saw no need to do. (See also [3.31] above.)

Fraud

[8.15] It is a well-settled rule of insurance law that an insured who makes a fraudulent claim which is detected will lose not only the amount of the fraudulent claim but also the amount of any genuine claim which could have been made in respect of the same occurrence. The purpose of the rule is clearly to discourage the making of fraudulent claims by imposing a draconian consequence. Someone who has a genuine claim cannot fraudulently add onto it on the basis that if he is not detected he will recover the whole claim and that if he is detected, he will still have the justified part of the claim.

[8.16] The precise scope of this rule had to be examined by the Court of Appeal in *Axa General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112, [2005] 1 All ER (Comm) 445. In this case, Mr and Mrs Gottlieb, who were insured by the claimants, made four claims on a household policy during the policy year starting 31 August 1993. In respect of two claims, there was no fraud. In respect of the other two claims, there were fraudulent elements, particularly relating to claims for alternative accommodation

which had not in fact been occupied but there were genuine claims for repairs and damage caused by escape of water and payments had been made in respect of these claims before the fraudulent claim was put forward. The Court of Appeal held that, in respect of the two claims where there had been no fraud, the payments made by the insurer could not be recovered. However, in respect of the two cases where fraud had taken place, all the payments made could be recovered by the insurer whether they had been made before or after the commission of the fraud.

Misrepresentation

[8.17] The Misrepresentation Act 1967, s 2(2) provides:

‘Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed in any proceedings arising after the contract, that the contract ought to be or has been rescinded the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission if of the opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.’

[8.18] The Court of Appeal considered the circumstances in which rescission should be denied under this subsection. In *UCB Corporate Services Ltd v Thomason* [2005] EWCA Civ 225, [2005] 1 All ER (Comm) 601 (see also [3.43] above) both the trial judge and all three judges in the Court of Appeal thought that in the circumstances it was equitable to deny rescission. The facts were complex but in the essentials, the claimant bank was seeking to set aside a waiver of rights under a guarantee provided by the defendants. Though there was no doubt that there had been extensive though not fraudulent misrepresentation by the defendants, the most important factor was that if damages were given instead of rescission, the claimants would in fact make no recovery because no loss could be proved in respect of the misrepresentation, since the judge had concluded that in the circumstances, having regard to the defendants’ dire financial position, it was not established that the claimant would have been better off if the waiver had never been entered into.

[8.19] This is an important decision because s 2(2) is usually discussed in the context of the claimant seeking damages in lieu of rescission. In the present case, it is in effect the defendant who is urging that damages should be given in lieu of rescission because the amount of damages will be nil (or no doubt in other cases very small).

Fiduciaries

[8.20] *Hilton v Barker Booth and Eastwood (a firm)* [2005] UKHL 8, [2005] 1 All ER 651 can reasonably be regarded as the contract case of the

year, though perhaps the most striking feature of the case is that the claimant should have had to go all the way to the House of Lords to get anywhere near to receiving justice, a fact on which Lord Walker of Gestingthorpe expressly commented. In this case, the claimant was a developer in a modest way and in 1990 put up a sign on a piece of land in Blackpool which he had acquired carrying the words 'Hilton Homes' and his telephone number. In June or July 1990 he received a phone call from a Mr Bromage, who expressed an interest in buying flats on the site once they had been built. The defendant solicitors acted for both Mr Hilton and Mr Bromage. The defendants knew that at the time Mr Bromage had recently come out of prison, where he had spent some nine months having been convicted of a number of offences relating to fraudulent trading while an undischarged bankrupt and so on. This history was well known to the defendants but they did not reveal it to Mr Hilton. In 1990 plans were reached to develop a different site. Mr Hilton agreed to buy the site from its owners for £85,000, to develop it by erecting six flats, and to sell the developed property to Mr Bromage for £351,000. There was another contract by which Mr Bromage, unknown to Mr Hilton, agreed to sell on the flats to a sub-purchaser for £390,000. All three contracts were exchanged on 10 September 1990 and the defendants acted for both Mr Bromage and Mr Hilton. It was clearly professionally improper for the defendants to act on both sides in a case of this kind, where there was a conflict of interest. The defendants went further because they privately advanced to Mr Bromage £25,000 which was paid by way of a deposit, as they did in respect of a further development transaction on the Watson Road site. By November 1991 the flats on the first development were ready for completion but Mr Bromage failed to complete. In January 1992 the defendants finally revealed that they could not act for both parties and told Mr Hilton that he should get another solicitor. In due course, Mr Hilton started proceedings against the defendants.

[8.21] The trial judge held that the defendants had been in breach of their professional duty to Mr Hilton and went on to hold that this had not caused Mr Hilton any loss since, if he had gone to another independent solicitor, that solicitor would not have known of Mr Bromage's conviction and would not therefore have told Mr Hilton about it. The Court of Appeal affirmed this decision though on not quite the same grounds. They held that it was an implied term of the contract between the defendants and Mr Hilton that they were released from any duty of disclosure in relation to matters which they were legally obliged to treat as confidential.

[8.22] Lord Walker of Gestingthorpe in the principal reasoned speech thought these decisions clearly wrong. They were inconsistent with the leading case of *Moody v Cox* [1917] 2 Ch 71, [1916–17] All ER Rep 548. As Lord Walker said (at [41]) this case establishes that if a solicitor puts himself in a position of having two irreconcilable duties, it is his own fault. In this case BBE were in the position (through their own fault) of

having two irreconcilable duties, to Mr Bromage and to Mr Hilton, and of also having a personal interest (because of the undisclosed £25,000 loan, which was likely to be recoverable only if Mr Bromage did well in his transaction with Mr Hilton). On the face of it their position was significantly worse than that of the solicitor in *Moody v Cox*. He continued (at [44]):

‘Mr Gibson submitted that a solicitor who has conflicting duties to two clients may not prefer one to another. That is, I think, correct as a general rule, and it distinguishes the case of two irreconcilable duties from a conflict of duty and personal interest (where the solicitor is bound to prefer his duty to his own interest). Since he may not prefer one duty to another, he must perform both as best he can. This may involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other. But in any case the fact that he has chosen to put himself in an impossible position does not exonerate him from liability.’

(See also [16.46], [23.4]–[23.5] below.)

Agency

[8.23] In *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch), [2005] 4 All ER 73 Mr and Mrs Solland (the third and fourth defendants) and the companies which they had set up (the first and second defendants) had done work worth nearly £20m by way of luxurious refurbishment of the properties of the claimant, a holding company for the interests of the royal family of Qatar. The work had been arranged by the fifth defendant, who was the agent of the claimant. He had arranged that the first four defendants would inflate the prices by 10% so as to be able to pay him a secret commission worth nearly £2m. There is no doubt that in English agency law the agent in such circumstances is under an obligation to repay the commission.

[8.24] The problem is whether the remedy against the agent is a purely personal one or whether it attaches to property in the hands of the agent which can be seen to come from the secret commission. This is important, of course, where, as seems to be implicit in the present case, there are other claims against the agent and he does not have funds to meet all such claims. In such circumstances, the proprietary remedy against the agent will give the principal substantially better protection.

[8.25] For many years the problem with a proprietary remedy in such circumstances has been the decision of the Court of Appeal in *Lister & Co v Stubbs* (1890) 45 Ch D 1, [1886–90] All ER Rep 797. This decision has always been regarded as dubious and the Privy Council refused to apply it in *A-G for Hong Kong v Reid* [1994] 1 All ER 1. In an impressive judgment, Lawrence Collins J held that, as a matter of the rules of precedent, a High Court judge should follow a modern Privy Council decision rather than an old Court of Appeal decision. He was obviously fortified in this conclusion, however, by the perception that the Privy

Council decision was in any case to be preferred. There has been fierce academic debate about this. Many academics, including such heavyweights as Professor Sir Roy Goode and the late Professor Peter Birks, have argued that in such circumstances the only remedy should be personal. The opposite view has been taken by equally eminent authors such as Goff and Jones and Lord Millett, writing extra-judicially in (1993) *Restitution Law Review* 7. Collins J thought (at [86]) that: 'there are powerful policy reasons for ensuring that a fiduciary does not retain gains acquired in violation of fiduciary duty, and I do not consider that it should make any difference whether the fiduciary is insolvent.' (See also [3.1] above and [16.41] below.)

Damages

[8.26] There have been three decisions on damages, of which the most interesting is perhaps *Jackson v Royal Bank of Scotland plc* [2005] UKHL 3, [2005] 2 All ER 71, [2005] 1 All ER (Comm) 337 (see also [3.3] above). In this case the claimants imported goods from the Far East. One of their principal customers was a partnership which traded under the name Economy Bag. Economy Bag retailed dog chews and the claimants bought dog chews from a Thai supplier called Pet Products and resold them to Economy Bag. The transactions were financed by transferable letters of credit. As it happened, both the claimants and Economy Bag banked with the defendants, the Royal Bank of Scotland. In the course of transferring one of the letters of credit, the defendants revealed to Economy Bag the mark-up which the claimants were making on the transaction and, as a result, Economy Bag did not enter into any new contracts with the claimants.

[8.27] By the time the case reached the House of Lords, it was accepted that the bank was in breach of its contract with the claimants by revealing this information and the question was what damages could be recovered by the claimants. The trial judge thought that it was well within the contemplation of the bank at the time of the contract that if they revealed this confidential information it would lead Economy Bag to terminate the relationship. This was obviously a possibility in any case, since Economy Bag did in fact know the name of the Thai supplier but the size of the mark-up was such as to make the possibility of termination much greater. This seems clearly correct.

[8.28] The trial judge took the view that the relationship was likely to last up to four years but that the chances of it coming to an end would increase as the years went by and he therefore applied a discount for each successive year. The Court of Appeal reversed this judgment and held that damages should be calculated on the basis that the relationship would have come to an end after a year. The House of Lords reversed the Court of Appeal's decision and restored the decision of the trial judge. (They thought that some criticisms could be made of the trial judge's arithmetic

but that, on the evidence before the House, it was not possible to arrive at a more accurate figure and that it would be disproportionate to send the case back for reassessment in view of the delay.) Clearly, on the facts of this case there can be no certainties as to what would have happened to the trading relationship between the claimants and Economy Bag. On the other hand, there was obviously a substantial possibility that the relationship would continue. In essence, the claimants were recovering damages for loss of the chance of this happening. Lord Hope, delivering the principal speech, thought that the Court of Appeal were clearly wrong in talking in terms of what was to be contemplated at the date of breach, whereas in principle the question must be what was contemplated at the date of the making of the contract. Furthermore, since the bank had not chosen in the contract to attempt to limit its liability (no doubt the bank's draftsmen are hard at work now revising such contracts) the judge's approach that the chances that Economy Bag would go elsewhere were becoming increasingly greater and was to be preferred to the Court of Appeal's decision to impose a clear cut-off point after only a year.

[8.29] Questions of loss of a chance also arose in *Maden v Clifford Coppock & Carter (a firm)* [2004] EWCA Civ 1037, [2005] 2 All ER 43 in the context of assessment of damages for solicitors' negligence (see [23.20] below).

[8.30] The facts are somewhat complicated and perhaps need not be examined in detail. The claimant was unlucky enough to have engaged two negligent solicitors in turn in relation to the development of a piece of land. His action against the first solicitor was settled and the judge and the Court of Appeal thought that the settlement of this action had no impact on the claim against the second solicitor. The central question was what the claimant would have done if he had been carefully advised by the second solicitor about an action against a Mrs Chadburn, who was not a party to or a witness in the proceedings. The trial judge held that the action would have been settled for £20,000 plus costs. The Court of Appeal thought that although it certainly was substantially more likely than not that the claimant would have settled for such a figure, if properly advised, it was not certain that Mrs Chadburn would and that, in the circumstances therefore, there should be a small discount, say of 20%, on such a settlement figure.

[8.31] The third case, *Golden Strait Corp'n v Nippon Yusen Kubishika Kaisha, The Golden Victory* [2005] EWHC 161 (Comm), [2005] 1 All ER (Comm) 467 is of a very different kind, raising difficult issues on which one would not be surprised to see different views expressed. In this case the contract was for a time charterparty for seven years with one month more or less at the charterer's option. It was to run from 1998 to 2005. The charterers repudiated the contract by redelivering the vessel in December 2001 when it had some four years to run. The owners accepted the repudiation as bringing the charter to an end by a letter dated 17 December 2001 and sued for damages.

[8.32] If these were the only facts then damages would normally be calculated by comparing the charterparty hire with what could be obtained on the market for a four-year time charterparty at the date of the repudiation. The complicating factor was that the charter contained a clause providing that if war broke out between any of the listed countries, both the owner and the charterer should have a right to cancel the charter. In fact, the second Gulf War began in March 2003 and there was no doubt that if the charter had still been subsisting at this stage either the owner or the charterer would have been entitled to terminate. The critical question was therefore whether it was open to the charterer to argue that it need only pay damages for the period between December 2001 and March 2003 and that the owners had not suffered any loss for the last 32 months of the charter because of the war termination clause. By an award dated 27 October 2004, an arbitrator had held that this argument was open to the charterer and the present proceedings were by way of appeal from the arbitrator. Langley J affirmed the decision of the arbitrator.

[8.33] The most important previous decision was that of the Court of Appeal in *Maredelanto Cia Naviera SA v Bergbau-Handel GmbH, Mihalis Angelos* [1970] 3 All ER 125. In that case, the majority of the Court of Appeal held that the charterer was entitled to terminate because the breach by the owner of the expected readiness to load clause was to be treated as a breach of condition. But all of the members of the Court of Appeal considered what the position would be if the charterers' repudiation was wrongful, granted that a few days later the charterer would have discovered that it had a right to exercise the cancellation clause in the charter which provided that if the ship did not arrive by the 20th of the month, the charterer should be entitled to cancel. The Court of Appeal did not think that the cancellation clause permitted one to cancel in advance even if it could be proved to be 100% certain that the event giving rise to the cancellation would arise. But all were agreed that, in the circumstances, even if the charterers' termination were invalid, the owner would in fact have suffered no loss.

[8.34] Langley J thought that the reasoning of the Court of Appeal in the case was applicable because the overriding principle was that damages were only intended to compensate for loss which had actually occurred and that at the date of judgment the outbreak of the war was a known event.

[8.35] There is a factual difference between the two cases. In *Mihalis Angelos* it was completely certain at the date of the supposedly wrongful repudiation by the charterer that within a few days he would have been entitled to cancel because the position of the vessel made it absolutely certain that it could not reach Haiphong before the cancellation date. In the present case, it was not certain on 14 December 2001 that the second Gulf War would break out in March 2003. The arbitrator had in fact found that at 17 December 2001 a reasonably well-informed person would

have considered war between the United States and the United Kingdom and Iraq as 'merely a possibility' but not 'inevitable or even probable'.

[8.36] One thing which could be relevant is what the owners did after the repudiation. Apparently, they relet the vessel on the spot market. Of course, the owners could do what they liked but it is arguable that what they had been deprived of in December 2001 was a four-year term with a war cancellation clause. On the face of it, evidence of what the market rate for such a reletting would be would be more relevant to the calculation of the loss than what could be obtained on the spot market. In a highly sophisticated market of this kind, the possibility that the charter might be cancelled because of the outbreak of war would factor into the rates in some way. There was no discussion of these difficulties in the judgment.

[8.37] As a matter of principle, the problem is that if the arbitrator had delivered his award before March 2003 he would have had to take account of the fact that war had not broken out and, indeed, if he had been making a decision on Christmas Day 2001, he would not have been at all sure whether war would break out. Undoubtedly, there is a general principle that usually damages should be assessed at the date of breach.

[8.38] As is often the way with cases, the report does not reveal some of the facts which one would really like to know. For instance, it is clearly assumed that the charterer, if the charter had still been subsisting, would have exercised the right to terminate when war broke out. On the face of it, however, this would only be true if the outbreak of war forced freight rates down since, if rates went up, a prudent charterer might well decide not to terminate. No doubt the arbitrator and the parties know very well what the effect of the events of 2003 was on the market but it would be interesting to be told.

Contribution

[8.39] Section 1(4) of the Contribution Act 1978 provides:

'A person who has made or agreed to make any payment in bona fide settlement or compromise of any claim made against him in respect of any damage (including a payment into court which has been accepted) shall be entitled to recover contribution in accordance with this section without regard to whether or not he himself is or ever was liable in respect of the damage, provided, however, that he would have been liable assuming that the factual basis of the claim against him could be established.'

In *Baker & Davies plc v Leslie Wilks Associates (a firm)* [2005] EWHC 1179 (TCC), [2005] 3 All ER 603 the claimant building contractor, in pursuance of a settlement between it and its employer, had carried out substantial remedial works. The claimant argued that it was entitled to contribution from the defendant who was its consulting engineer in relation to the project. The defendant argued that contribution under the

Act was not possible because the claimant had made no payment. This view had been accepted by Judge John Hicks QC in *George Stow & Co Ltd v Walter Lawrence Construction Ltd* (1992) 40 Con LR 57. Judge Richard Havery QC took the opposite view. He thought that the word 'payment' in this context included a payment in kind, at any rate where a payment in kind was capable of a monetary valuation. (See also [21.28] below.)

Injunctions

[8.40] In *LauritzenCool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [2005] 2 All ER (Comm) 183 (also discussed at [22.47]–[22.49] below) the defendant owners had time chartered two reefer vessels to the claimant charterers. These vessels form part of a pool managed by the charterers. The owners alleged that the charterers had breached various duties over them and they told the charterers that they wished to take the vessels out of the pool before the expiry of the charter. The charterers commenced arbitration proceedings and sought an undertaking from the owners that they would not withdraw the vessels pending the termination of the arbitration. The owners refused to give such an undertaking and the charterers sought injunctive relief. The owners argued that it was inappropriate to give an injunction because it had often been said that a time charter was essentially a personal contract like a contract of service: see, for instance, *Scandinavian Trading TankerCo AB v Floter Petrolera Ecuatoriana, The Scaptrade* [1983] 2 All ER 763. Cooke J and the Court of Appeal held that, in the circumstances, it was appropriate to give an injunction.

[8.41] It was accepted that *The Scaptrade* was authority for the proposition that specific performance will not be ordered of a time charter. The question here was whether that necessarily carried with it a further rule that negative injunctive relief should never be granted. Some forms of injunction might amount to affirmative orders akin to specific performance but it was not argued that the injunction sought in this case was of this kind. That there is a difference between specific performance and negative injunctions was clear from *Lumley v Wagner* (1852) 1 De GM & G 604, [1843–60] All ER Rep 368, which was cited by Lord Diplock. It is clear, moreover, that there are other cases which have gone further.

Criminal Law

ALAN REED, MA, LL.M

Solicitor, Editor of the Journal of Criminal Law; Professor of Criminal and Private International Law, University of Sunderland

Introduction

[9.1] In an interesting year for criminal law developments, three cases stand supererogatory. The Court of Appeal in *R v Barnes* [2004] EWCA Crim 3246, [2005] 2 All ER 113 had to wrestle with the synergy between sporting injuries, consent and the parameters of unlawful activity. In *R v Hasan* [2005] UKHL 22, [2005] 4 All ER 685, when faced with the issue of duress and voluntary joining of criminal associations, the House of Lords have severely constrained the ambit of the defence. The final case in the trio, *Re Holmes* [2004] EWHC 2020 (Admin), [2005] 1 All ER 490, serves to illustrate enduring problems in categorisation of money transfers by deception, and a Pandora's Box of dilemmatic choices for prosecutors.

R v Barnes: sport. Consent and the criminal law

[9.2] Little guidance has existed as to when criminal proceedings are apt subsequent to the causing of sporting injury. A degree of clarification was provided in *R v Barnes* [2004] EWCA Crim 3246, [2005] 2 All ER 113, but much remains unresolved (see also [24.5]–[24.8] below). During an amateur football match the defendant tackled another player who as a result sustained a serious leg injury. He was charged with unlawfully and maliciously inflicting grievous bodily harm contrary to s 20 of the Offences Against the Person Act 1861. The Crown contended that the elements of the offence were satisfied, since the injury was sufficiently serious and that Barnes committed the tackle either intentionally or with foresight of at least some harm. It was referred to as a 'crushing tackle, which was late, unnecessary, reckless and high up the legs'. The defendant admitted that the tackle was hard, but argued that it was a fair challenge in the course of play, and that the injury had been accidental.

[9.3] In his summing-up the trial judge made it clear that the defendant could only be guilty if the prosecution proved that what had happened was not done by way of 'legitimate sport'. After the jury asked for clarification on the import of this statement he asserted that the defendant would be guilty if 'he realised when he did the act that some injury, however slight, which was over and above legitimate sport, might result from what he was going to do and yet he ignored, or was willing to take that risk, or even deliberately set out to take the risk when tackling his opponent'. Barnes was convicted, but was granted leave to appeal on

the grounds that the judge erred in directing the jury that the unlawfulness of D's action and the definition of recklessness were both related to the notion of 'legitimate sport' without giving guidance as to what constituted legitimate sport. Moreover, it was contended that the jury had received no proper explanation of the key concepts of consent or accident as a defence, or the relevance of a genuine attempt to play by the laws of the game. The Court of Appeal, as considered below, held that there was a misdirection, and, thus, that the conviction was unsafe. Before deconstructing the rationale for their perspective in more detail, it is important to consider the role of consent within the criminal law vis-à-vis physical contact sports. Their Lordships in *Barnes* struggled to grapple with these overarching policy determinants.

Consent as a defence

[9.4] It has to be said at the outset that the law in this area is not altogether free from confusion. This stems from the need to balance the freedom of the individual to choose what he wants to do with his body against the right of the state to protect the individual from harming himself and thereby harming society in general. At one extreme there is the view, based on personal autonomy, that our bodies are our own and we should be entitled to do as we please with them. At the other extreme is the view that the state should be able to interfere to prevent an individual doing anything which might be thought to be harmful to him- or herself. A paternalistic approach could be defended upon the basis either that society simply has the right to lay down certain limits to behaviour or that self-inflicted injuries use up valuable medical resources which could be used on more deserving cases.

[9.5] The law as to the limits of consent represents an attempt to strike a balance between individual freedom and the interests of the state. It is probably safe to say that the law does not permit citizens to consent to being killed. Even here, however, certain qualifications need to be made. While it is clear that euthanasia is not permitted in this country, there is nothing to stop an individual refusing to accept medical treatment. The law draws a sharp line between omission and commission. We are entitled to consent to being allowed to die peacefully without further treatment, but we may not consent to being killed. Consent may also be relevant in determining a secondary party's liability for murder. In *S v Robinson* 1968 (1) SA 666, the defendants agreed to kill the victim with his consent. When at the last minute the victim withdrew his consent, the principal offender nevertheless carried out the killing. It was held that the accessories were not liable for murder since the defendant had exceeded the agreed plan to kill the victim with his consent. Thus, while the principal offender was guilty of murder since even had consent not been withdrawn, it would not protect the actual killer, the accessories were, in effect, protected by the deceased's consent.

[9.6] In *R v Dudley and Stephens* (1884) 14 QBD 273, [1881–5] All ER Rep 61 the defendants were convicted of the murder of a cabin boy whose body they had fed upon to save themselves from starvation after having been adrift in a lifeboat without food for eight days and water for six days. It is clear that the cabin boy did not assent to being killed, but were the same facts to recur today, it is possible that the court would take a different approach if it were established that the victim had consented to be killed to save the others.

[9.7] In boxing, the contestants clearly consent to the risk of serious bodily injury being inflicted upon themselves. Outside of the ring, if A were to render B unconscious by a blow on the head, a jury would be entitled to find that A had caused B grievous bodily harm. Today, however, the contestants know that such a blow might cause death and they must be taken to have consented to the – albeit highly unlikely – risk of death.

[9.8] It is also fairly safe to say that consent is a defence to common assault. In practice this will be relevant only to the crime of battery, which requires proof that the defendant has applied unlawful force to the victim. Battery does not require the infliction of harm; any non-consensual touching can amount to a battery, however slight. Earlier cases tended to treat absence of consent as an element of the offence of battery in the same way that absence of consent is part of the crime of rape. In *R v Brown* [1993] 2 All ER 75 the majority of the House of Lords thought that consent was more properly referred to as a defence. The practical effect of this decision is that as a defence it places an evidential burden on the accused to produce evidence of consent before the judge is obliged to put it before the jury.

[9.9] The law assumes consent in the contact between persons in everyday life. Whether this is based on implied consent or a sort of doctrine of necessity is not very important. It would be absurd to expect express consent to the bodily contact experienced in busy streets, shops and public transport. Apart from such instances of necessary social contact, it is clear that we can consent to being touched; for example, we may give consent to the hairdresser cutting our hair. Equally, we can consent to sexual contact, though this is generally limited to those over the age of 16. We can, thus, say that consent is generally a defence to battery where no injury is involved.

[9.10] The major problem for the courts is whether consent will be available as a defence where bodily harm has been caused. A minute's thought will show that the law does allow persons to consent to the infliction of bodily injury or at least to the risk of it; the most obvious example is in violent sports such as boxing and rugby football. There must also be some way in which a surgeon who opens up a patient on the operating table with a very sharp knife is protected against a charge of unlawful wounding.

[9.11] Until 1993 the position was covered by the case of *A-G's Reference (No 6 of 1980)* [1981] 2 All ER 1057. In that case two youths had resolved to settle a dispute by a fight, during the course of which the defendant caused the other to suffer a bleeding nose and a bruised face. It would appear that the defendant was charged with a common assault. The Court of Appeal held that while consent would normally be a defence to common assault, there might be cases where the public interest demanded otherwise (at 1059 per Lord Lane CJ):

‘... it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in public or private; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.’

[9.12] The phrase ‘for no good reason’ is a reference to the exceptions to the general rule where there is deemed to be a public interest in allowing activities where harm is caused or intended. Boxing matches would be a prime example of such an exception. Lord Lane CJ commented (at 1059):

‘Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in other cases.’

The position could be summarised as laying down a general rule that consent was irrelevant wherever bodily injury was intended and/or caused, unless the case fell within one of the well-known exceptions.

[9.13] The whole issue of consent was brought dramatically before the House of Lords in *Brown*. In that case a group of homosexual males had been discovered participating in sado-masochistic practices. These practices usually involved the recipient of the activity being manacled so as to be powerless while another member of the group carried out such activities as the nailing of the recipient's scrotum to a board or the burning of his penis with a candle. It is clear that all the recipients gave their full consent to what was done. The group had a series of code words which could be used by the recipient to stop the procedures at any stage. It also appeared that younger persons had been introduced to these practices and that video recordings were made, not for sale, but for viewing by members who had missed that evening's events. The defendants were charged with a variety of offences, but the House of Lords was concerned primarily with the charges of assault occasioning actual bodily harm and unlawful wounding brought under the Offences Against the Person Act 1861. The Court of Appeal, in dismissing their appeals against conviction, had certified the following question:

‘Where A wounds or assaults B occasioning him actual bodily harm in the course of a sado-masochistic encounter, does the prosecution have to prove

lack of consent on the part of B before they can establish A's guilt under section 20 or section 47 of the Offences Against the Person Act 1861?"

[9.14] It was argued for the defendants that since the injuries fell short of being serious, the prosecution could only succeed if it could establish a lack of consent on the part of the victims. In other words, the law should respect the privacy of people's homes. By a majority of three to two the House held that consent was irrelevant. The majority took the view that the conduct was presumptively unlawful in that it involved violence, cruelty and abnormal and perverted homosexual activity. For example, Lord Templeman commented (at 235):

'In my opinion sado-masochism is not only concerned with sex. Sado-masochism is also concerned with violence. The evidence discloses that the practices of the appellants were unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious or worthless ...'

[9.15] The majority concluded that on the face of it the activities fell within the definition of the offences and that since injury was both intended and caused, consent was irrelevant unless the court could find that there was a good reason to allow the activity. In other words, the majority considered that consent was not an integral part of the definition of these offences, but was a defence to charges where injury was either intended or caused only if the facts fell within one of the well-known exceptions such as sporting activity or medical treatment. Their Lordships were, therefore, being invited to create a new exception to cover the intentional infliction of bodily harm in the course of sado-masochistic practices. The majority held that there were several good reasons why the defence should not be extended to cover these activities. In the first place, it was simply good luck that these men had not suffered any really serious infections or injuries. Secondly, there was a risk of spreading such diseases as AIDS. Thirdly, there was the danger that young persons might be drawn into these unnatural practices. There was therefore no public interest in permitting such practices.

[9.16] The defence argued that the law should draw a line between grievous bodily injuries and actual bodily injuries, allowing consent as a defence to the latter. This would, however, cause a problem in relation to s 20 of the Offences Against the Person Act 1861. Wounding in s 20 may not necessarily constitute grievous bodily harm. It would, therefore, result in a line being drawn with s 47 and those woundings which fell within s 20 and did not amount to grievous bodily harm on the one side, and grievous bodily harm and those woundings which also amounted to grievous bodily harm on the other. The majority were not prepared to lend their support to such a suggestion. It was far easier to draw a line between assaults involving no injury and assaults occasioning actual bodily harm.

[9.17] The result would seem to be that consent is a defence only to common assault (and battery), and then only if there is no injury caused

and/or intended. Where harm is intended and/or caused consent will be no defence unless there is some good reason to justify it in the public interest. Of course, the issue in *Barnes* was whether this exception applied.

[9.18] In *A-G's Reference (No 6 of 1980)* it was said that it was not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. The phrase 'for no good reason' is a reference to the acceptance by the courts that the interests of the public require that individuals be allowed to consent to the infliction of bodily injury. The two major situations where this is so are rough sports and medical treatment.

[9.19] Without some relaxation of the general rule, most contact sports would be illegal. It is in the public interest that people engage in sporting activity, both as a means of gaining exercise and also in the cause of providing entertainment for the public at large. The law has to strike a balance between acceptable and unacceptable risks. Brutality cannot be licensed under the name of sport. In many sports there is an acknowledgment that the participants may sustain injuries, though the expectation is that this will be rare. This is true for such sports as athletics and tennis. At the other end of the spectrum, however, is boxing, in which each opponent is aware that the other intends to cause him serious bodily injury. In the middle lie contact sports such as rugby and soccer, as in *Barnes*, in which players are aware that deliberate contact in the form of tackles may have unintended effects, conceivably of sufficient severity to amount to serious bodily harm.

[9.20] It is tempting to say that in sport the participants consent to injuries received within the rules of the game, but this would be going too far. If the sports governing body was to introduce a new rule which the courts felt likely to lead to numerous serious injuries, it would be open to them to say that the participants had not consented to those injuries. Boxing, however, shows us that the legislature and the courts are unwilling lightly to invoke their powers. In *Brown*, Lord Mustill said of boxing (at 422):

'For money, not recreation or personal improvement, each boxer tries to injure the opponent more than he is hurt himself, and aims to end the contest prematurely by inflicting a brain injury serious enough to make the opponent unconscious, or temporarily impairing his central nervous system through a blow to the midriff, or cutting his skin to a degree which would ordinarily be well within the scope of section 20. The boxers display skill, strength and courage, but nobody pretends that they do good to themselves or others. The onlookers derive entertainment, but none of the physical and moral benefits which have been seen as the fruits of engagement in manly sports.'

If as a result of a knockout blow the recipient dies, the winner would be able to rely on the consent of his opponent to the infliction of grievous bodily harm. Hence consent in these circumstances would be a defence to a charge of murder.

[9.21] Boxing's predecessor, prize-fighting, which involved fighting with bare fists, was made unlawful in the last century. It was felt to be no longer in the interests of the public to tolerate it. In *A-G's Reference (No 6 of 1980)*, where two boys had fought to resolve a dispute the courts refused to allow the defence of consent. Had they taken the trouble to go to a gymnasium, put on boxing gloves and entered a boxing ring, they could have knocked hell out of each other with impunity in the name of sport.

[9.22] Sports such as soccer and rugby often involve quite violent bodily contact. Obviously, those who take part in such sports consent to fair tackles even though these may sometimes lead to quite serious but unintentional injuries. Do they consent to injuries received from tackles which constitute fouls under the rules of the sport? Today it is generally accepted that tackles from behind in soccer are dangerous and often lead to serious injuries. For this reason they not only constitute a foul, but will normally result in the player being booked or even sent off the pitch. It is suggested that players do not consent to the deliberate infliction upon themselves of any degree of bodily harm and that courts would be unwilling to allow consent as a defence. However, it is much more likely that the injury will be a result of recklessness. Experienced players will know that virtually any tackle can lead to injury and to this extent any player making a tackle consciously takes a risk of doing so. Players are well aware that tackles from behind a player who is moving at speed could well cause a broken leg, similarly a player who jumps for a ball in the penalty area with his elbows raised will be aware that this could cause serious facial injuries. It is suggested that players do not consent to such reckless injuries and that the perpetrators should be criminally liable for having consciously taken an unjustified risk of causing actual or grievous bodily harm.

[9.23] In the case of other tackles which are not seen as dangerous, it is still possible that injuries may be caused. However, in the vast majority of tackles so long as the allegation is that the accused was reckless, the risk would be considered to have been one he was justified in taking. Did the appellate court in *Barnes* accept these prevailing considerations?

The impact of the decision in Barnes

[9.24] As previously stated, their Lordships in *Barnes* determined that the decision was unsafe in light of the trial judge's misdirection. Given the paucity of authorities involving sport and the criminal law, the decision is important in relation to the types of behaviour within sport which should attract criminal liability and the role of consent within the criminal law to physical contact within organised sports. A number of important points may be established from the case.

[9.25] First, their Lordships stated unequivocally that most organised sports have their own disciplinary procedures for enforcing their own

particular rules and standards. The logical corollary of this is that in the majority of situations there is not only no need for criminal proceedings, but it is undesirable that there should be any criminal proceedings. The first port of call will be redress through self-governance set up by the relevant sport governing body procedure. Civil remedies also exist for damages for injuries caused by negligence or assault. It is only for exceptional situations that criminal proceedings are activated, where 'the conduct is sufficiently grave to be properly categorised as criminal'. This has a resonance with the 'so bad' justification for gross negligence manslaughter established by the House of Lords in *R v Adomako* [1994] 3 All ER 79.

[9.26] Second, Lord Woolf in *Barnes*, relying on acknowledged general principles on consent, drew on important distinction between serious injury in sport caused by accident, and that brought about intentionally or wilfully. Public policy concerns mandate a defence in the former but not the latter scenario. The decision of the House of Lords in *R v Brown* [1993] 2 All ER 75, albeit in the very different factual context of sado-masochistic activities between consenting adults, set the parameters of consent as a defence rooted in public policy. Lord Mustill, whilst dissenting in *Brown* itself, provided an illuminating dichotomy relied upon in *Barnes* between deliberate/non-deliberate bodily contact:

'In the contact sports each player knows and by taking part agrees that an opponent may from time to time inflict upon his body (for example by a rugby tackle) what would otherwise be a painful battery. By taking part he also assumes the risk that the deliberate contact may have unintended effects, conceivably of sufficient severity to amount to grievous bodily harm. But he does not agree that this more serious kind of injury may be inflicted deliberately.'

[9.27] Third, the significance of the availability of consent as a defence to accidental serious injury is to set in chain a fundamental demarcation between accidental/intentional infliction of harm. The fact that the participants in a soccer match implicitly consent to take part in a game, assists in identifying the limits of the defence. The result is that if what occurs goes beyond what a player can reasonably be regarded as having accepted by taking part in the sport, this indicates that the conduct will not be covered by the defence. Of course, what is implicitly accepted in one sport will not necessarily be covered by the defence in another sport. Consider, for instance, the high-impact game of ice hockey. In *R v Cey* (1989) 48 CCC (3d) 480 a player was cross-checked from behind into the boards, causing facial injuries, concussion and whiplash. The defence was predicated on implied consent, arguing that the victim consented to being checked in that way merely by stepping on to the ice. Despite the nature of ice hockey as a physical high-contact sport, in giving the majority judgment, Gerwing JA (Cameron JA concurring), made it clear (at 490) that the level of violence exposed was unacceptable:

'[S]ome forms of bodily contact carry with them such a high risk of injury and such a distinct probability of serious harm as to be beyond what, in fact, the players commonly consent to, or what, in law, they are capable of consenting to.'

In effect, there is a recognition that in some sports, such as ice hockey, a particular level of violence is a concomitant of voluntary engagement. However, beyond that participatory involvement bringing with it implied consent to a degree, nonetheless a threshold exists beyond which inherently dangerous conduct negates any public policy defence. Legal recognition of consent as a defence is consequently excluded.

[9.28] Fourth, their Lordships in *Barnes* expressly approved the position on contact sports set out by the Law Commission in *Consent and Offences Against the Person* (1993) (Law Com no 134). The Law Commission highlighted that in contact sport there is consent to such contact even if serious injury may result through 'unfortunate accident', but there is no consent to 'being deliberately punched or kicked'. Moreover, in determining whether reckless infliction of injury should be evaluated as criminal, a crucial determinant will be whether the injury occurred during play, in the heat of the moment when play has ceased or 'off the ball'; an injury occurring during play can still be criminal if it results from unreasonable risk-taking. Hence, the more the act causing injury is removed from actual play then exponentially it is more likely to embrace liability. If it is an act within the laws of the game then, *prima facie*, it is presumptively non-criminal. The Law Commission stated at (para 10-18):

'[T]he present broad rules for sports and games appear to be: (i) the intentional infliction of injury enjoys no immunity; (ii) a decision as to whether the reckless infliction of injury is criminal is likely to be strongly influenced by whether the injury occurs during actual play, or in a moment of temper or over-excitement when play has ceased, or "off the ball"; (iii) although there is little authority on the point, principle demands that even during play injury that results from risk-taking by a player that is unreasonable, in the light of the conduct necessary to play the game properly, should also be criminal.'

[9.29] Fifth, an objective test has been set for the threshold of liability on sporting injuries, mirroring the circularity of the gross negligence manslaughter test established by Lord Mackay in *R v Adomako* [1994] 3 All ER 79. The arbiters of fact – magistrates or jury – must evaluate all surrounding circumstances attending to the injury embracing the type of the sport; the level at which it is played; the nature of the act; the degree of force used; the extent of the risk of injury; and the state of mind of the defendant as relevant to the imposition of liability. This amorphous set of criteria allows for solipsistic development of our law, with ad-hocery the substitute for certainty. Lord Woolf CJ left a vital question (at 118) for jury evaluation as to, 'whether the contact was so obviously late and/or violent that it could not be regarded as an instinctive reaction, error or misjudgement in the heat of the game'. In similar vein, the jury is

required to evaluate whether, in all the circumstances, a breach of duty that led to death is 'so bad' as to merit the imposition of criminal liability for gross negligence manslaughter. Lord Mackay concluded in *R v Adomako* [1994] 3 All ER 79 at 87 that:

'The essence of the matter, which is supremely a jury question, is whether, having regard to the risk of death involved, the conduct of the defendant was so bad in all the circumstances as to amount in their judgment to a criminal act or omission.'

[9.30] The overarching problem with the objective test laid down in *Barnes*, as with the definitional test of gross negligence manslaughter, is one of circularity. The jury is involved not merely in deciding whether a defendant has committed certain acts which fall within a given definition of an offence, but the jury is required to ask whether the defendant's conduct is such as to merit their label of criminality itself. It does this through having regard to all the circumstances surrounding the infliction of the injury, including the degree of the breach of the rules of the particular sport to determine whether the imposition of criminal liability is appropriate. In essence, the jury is required not merely to make a decision of fact on the evidence, but also to evaluate the definition of the crime itself. If the question is 'In sporting injury cases involving non-fatal offences what breach of the rules is required to attract the attention of the criminal law?', the answer is 'Breach of the rules of sufficient severity to attract the attention of the criminal law'. In effect, the jury is thus required, to take a view on the breach of rules/severity which would render the conduct of the defendant criminal. The impact is that a question of law – or at least a question of mixed fact and law – is left to the jury. In this context the decision in *Barnes* has consequently raised more questions than it has answered.

***R v Hasan*: duress and the voluntary joining of criminal associations**

[9.31] Duress is a defence which, if established, excuses what would otherwise be criminal conduct. If successfully raised, it exonerates the defendant altogether. In contrast to provocation as a defence to a charge of murder, it does not serve merely to reduce the seriousness of the crime which the defendant has committed.

[9.32] A significant issue arose, however, before the House of Lords in *R v Hasan* [2005] UKHL 22, [2005] 4 All ER 685. Could a defendant rely on the defence of duress when he had foreseen or ought to have foreseen that his voluntary association with known criminals involved a risk of being subjected to any compulsion by acts of violence, not necessarily compulsion to commit crimes of the kind he was charged with? Their Lordships, surprisingly, posited a negative response, overriding earlier precedential authorities, and constrained further the ambit of the duress defence.

[9.33] Hasan had worked as a driver and minder for Claire Taeger, who ran an escort agency and was involved in prostitution. Subsequently, another individual, Frank Sullivan, had become her boyfriend and her minder in connection with her prostitution business. He had, according to the defendant, a notorious reputation of being a violent man and a drug dealer. At trial, the defendant had claimed that he had been coerced into committing the offence of aggravated burglary by Sullivan's threats that if he did not do so he or his family would be harmed, and that he had no chance to escape and go to the police. Hasan was convicted before the Central Criminal Court for aggravated burglary, for which he had been imprisoned for nine years. The issue of duress was left for jury deliberation, and rejected. The judge had put to the jury the specific question: 'Did the defendant voluntarily put himself in the position in which he knew he was likely to be subjected to threats? If you are sure he did, the defence fails and he is guilty.'

[9.34] The Court of Appeal, however, allowing the defendant's appeal, asserted that there had been a misdirection. The judge should have directed the jury to consider whether the defendant knew that he was likely to be subjected to threats to commit a crime of the very type with which he was charged. How specific did the foresight of the defendant have to be in the context of crime compulsion? The certified question, on appeal, *inter alia*, raised three possible solutions embracing either objective or subjective tests:

'Whether the defence of duress is excluded when as a result of the accused's voluntary association with others: (i) he foresaw (or possibly should have foreseen) the risk of being subjected to any compulsion by threats of violence, or (ii) only when he foresaw (or should have foreseen) the risk of being subjected to compulsion to commit criminal offences, and, if the latter, (iii) only if the offences foreseen (or which should have been foreseen) were of the same type (or possibly of the same type and gravity) as that ultimately committed.'

[9.35] Lord Bingham, delivering the leading judgment in *Hasan* on this specific point, examined the general principles underpinning this area. The starting point was the assertion made by Lowry LCJ in *R v Fitzpatrick* [1977] NI 20 at 33, drafted with the peculiar character of the IRA in mind:

'A person may become associated with a sinister group of men with criminal objectives and coercive methods of ensuring that their lawless enterprises are carried out and thereby voluntarily expose himself to illegal compulsion, whether or not the group is or becomes a proscribed organisation ... if a person voluntarily exposes and submits himself, as the appellant did, to illegal compulsion, he cannot rely on the duress to which he has voluntarily exposed himself as an excuse either in respect of the crimes he commits against his will or in respect of his continued but unwilling association with those capable of exercising upon him the duress which he calls in aid.'

[9.36] An individual who voluntarily joins a criminal gang knowing of its nature and knowing that it might bring pressure on him to commit an offence, will be unable to rely on duress if he did commit an offence in response to such pressure. This principle was established by the Court of Appeal in *R v Sharp* [1987] 3 All ER 103. The appellate court upheld a trial judge who had refused to leave to the jury a defence of duress put forward by one of three armed robbers. D asserted that he had participated only because the leader of the gang threatened to kill him if he did not. Evidence, however, existed that he had voluntarily joined the gang which had then committed an earlier robbery in which shots had been fired. It was held that the defendant's extreme culpability in knowingly exposing himself to the risk of duress destroyed any claim of duress as an excuse. These principles were extended in *R v Ali* [1995] Crim LR 303, where a heroin dealer and addict, in debt to the duressor, was threatened with death unless he participated in a conspiracy directed at robbing a bank or building society. It was determined that duress was inapplicable as a defence where D voluntarily joined himself to a violent individual. Application of the rule extended to where D realised he would become part of a crime and need not know precisely which violent offence he would be ordered to carry out where a range of violent offences were in contemplation at the outset.

[9.37] In *Sharp*, the issue did not arise whether duress was available as a defence where a defendant was unexpectedly faced with the prospect of committing a wholly different type of offence outside the scope of the initial gang enterprise. Nor did it arise whether the defence was available where unexpected pressure was applied to coerce D into an offence within the enterprise. These matters arose directly in the subsequent case of *R v Shepherd* (1988) 86 Cr App R 47, wherein the Court of Appeal determined that a distinction prevailed between joining, on the one hand, a gang promulgating violence as a political end or one tacitly prepared to resort to violence for other criminal means, and joining, on the other hand, a gang where D's absence of knowledge of a propensity to violence on the part of one gang member would not lead him 'to suspect that a decision to think better of the whole affair might lead him into serious trouble'. In the first scenario the voluntary act of joining the gang prevented D from relying upon duress, as he freely undertook the risk of duress. By way of contrast, in the second type of case the question ought to be left to the jury whether, via gang participation, D had knowingly taken the risk of violence against himself. In the event that duress materialised unexpectedly, then the jury could find that the risk of it had not been freely undertaken. For example, D, who participates in a small money transfer bank fraud, may legitimately claim no contemplation of threats of death or serious injury being imposed upon him as catalysts to the facilitation of violent offence(s). It may credibly be asserted that coercion to commit such offence(s) was unexpected, although such a defence will rarely succeed in practice.

[9.38] In essence, if D is aware of the risk of compulsion by threats of death or grievous bodily harm at the time he voluntarily associates with the ultimate duressor(s) then the defence may not be available although he may not have foreseen the particular type of crime the duressor(s) would require him to commit. In recent times the relevant principles have been developed in relation to drug dealing, where the accused in debt to violent drug dealers has engaged in the transportation or supply of dangerous drugs on their behalf. In *R v Heath* [1999] All ER (D) 1068 the accused, indebted to drug dealers, was charged with possessing a Class B drug with intent to supply, an offence committed under serious threats from his erstwhile 'creditor'. The court held that the defendant could not rely on duress as a defence because, although he was not a member of any criminal organisation or gang, by becoming indebted to a drug dealer he had voluntarily exposed himself to unlawful violence. There was credible evidence that the defendant appreciated that he had put himself in what he described as a 'bad position' and exposure to the risk of violence. He said: 'It's the drugs world. It can be heavy. People collected their debts in one way.' The defence is thus excluded where the risk of duress is freely undertaken and voluntary association has occurred which does not necessarily have to incorporate joining their gang or association. In this respect the Court in *R v Baker and Ward* [1999] 2 Cr App R 335 at 346 opined:

'[T]he accused, although not joining a gang or organisation, may have involved himself in criminal activities which bring him into contact with other criminals or circumstances where the accused knew or was aware that if he defaulted in fulfilling his role or in discharging his obligations he assumed in relation to other criminals he would be subjected to such compulsion. Drug dealing on a scale which is significant could be such a case.'

[9.39] In summary, an individual who voluntarily joins a violent organisation knowing that the organisation may apply duress cannot subsequently rely on that duress to found a defence (see *Sharp*). However, different principles have applied where the individual did not know, and could not reasonably have foreseen, that joining the criminal enterprise could expose him to the risk of the application of duress to commit a crime of a particular type. In *Baker*, for instance, it was asserted (at 344) that what a defendant has to be aware of is the risk that the group might try to coerce him into committing criminal offences of the type for which he is being tried by the use of violence or threats of violence.

The impact of the decision in Hasan

[9.40] The decision of their Lordships in *Hasan* is significant in constraining further the ambit of the duress defence. Proposition (i) in the certified question on appeal was followed, whereby duress is excluded as a defence where D foresaw (or possibly should have foreseen) the risk of being subjected to any compulsion by threats of violence. In the context

of a defendant voluntarily joining a criminal association, it is no defence that he did not foresee exposure to the risk of the application of duress if it 'ought' to have been foreseen. This is reflective of an external standard of liability equated to the amorphous test of the reasonable person. In such cases the defendant was, *ex hypothesi*, a person who had voluntarily surrendered his will to the domination of another. In holding that there had to be foresight of coercion to commit crimes of the kind with which he was charged, the appellate court in *Baker* had, apparently, misstated the law.

[9.41] Lord Bingham stated ([2005] 4 All ER 685 at [37]):

'The principal issue between the Crown on one side and the appellant and the Court of Appeal on the other is whether *R v Baker* correctly stated the law ... The defendant is seeking to be wholly exonerated from the consequences of a crime deliberately committed. The prosecution must negative his defence of duress, if raised by the evidence, beyond reasonable doubt ... Nothing should turn on foresight of the manner in which, in the event, the dominant party chooses to exploit the defendant's subservience. There need not be foresight of coercion to commit crimes, although it is not easy to envisage circumstances in which a party might be coerced to act lawfully. In holding that there must be foresight of coercion to commit crimes of the kind with which the defendant is charged, *R v Baker* mis-stated the law.'

[9.42] The House of Lords in *Hasan*, hostile to any extension of duress as a defence, have circumscribed general principles, and drawn a coach and horses through earlier precedents. Although not at issue in the case, Lord Bingham, obiter, stressed that the execution of a threat of death or serious personal injury must be reasonably believed to be imminent and immediate if it is to support a plea of duress (at [698]). He objected to any apparent dilution of this requirement in *R v Abdul-Hussain* [1999] Crim LR 570. Lord Bingham made clear the proposition that juries should be told that if the retribution threatened against D or his family or a person for whom he reasonably feels responsible is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could take evasive action, whether by going to the police or in some other way, to avoid committing the crime with which he is charged. This constraining perspective is twinned together with a delimiting view of voluntary criminal association derived in *Hasan* from an objective test of what the defendant, placed as he was, and knowing what he did, ought reasonably to have foreseen. Lord Bingham (at [38]–[39]) asserted:

'I am not persuaded otherwise by analogies based on self-defence or provocation for reasons I have already given. The policy of the law must be to discourage association with known criminals, and it should be slow to excuse the criminal conduct of those who do so. If a person voluntarily becomes or remains associated with others engaged in criminal activity in a situation where he knows or ought reasonably to know that he may be the

subject of compulsion by them or their associates, he cannot rely on the defence of duress to excuse any act which he is thereafter compelled to do by them. It is not necessary in this case to decide whether or to what extent that principle applies if an undercover agent penetrates a criminal gang for bona fide law enforcement purposes and is compelled by the gang to commit criminal acts. I would answer this certified question by saying that the defence of duress is excluded when as a result of the accused's voluntary association with others engaged in criminal activity he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence.'

[9.43] Further grist to the mill has been added for an urgent review and legislative response. The defence of duress is especially difficult for the prosecution to investigate and disprove beyond reasonable doubt. This difficulty is often exacerbated, as little detail of the alleged compulsion is propounded by the defence until the trial is under way. In this context it is disappointing that recommendations contained in Law Com no 218, *Legislating the Criminal Code: Offences Against the Person and General Principles*, simply gather dust on our library shelves. Their focal point on duress involved adoption of a novel solution. The suggestion was that a legal burden of proof, on the balance of probabilities, be placed on a defendant to establish a defence of duress. In light of the decision in *Hasan*, and judicial restriction of the defence, it is an apt time for a fresh reappraisal of reform considerations.

***Re Holmes*: money transfer by deception**

[9.44] In an important decision the Divisional Court in *Re Holmes* [2004] EWHC 2020 (Admin), [2005] 1 All ER 490 examined the technical nature of credit transfers in the context of the offence of obtaining a money transfer by deception. The disputed facts revolved around an international financial transaction. The applicant issued a payment order for more than US\$15.5m from his employer, Commerzbank Aktiengesellschaft Agm, a German bank, to ABN Amro Bank in Amsterdam. The funds so transferred could not initially be disposed of freely, since the transfer to ABN Amro Bank was originally subject to confirmation. It was alleged that he entered as recipient Wolpert Consultants Inc, a company controlled by him, using, without authorisation, the passwords of two of his colleagues to conceal his involvement in the transfer. Initially, the Amsterdam bank credited the amount to the company's account subject only to confirmation. Significantly, the applicant then confirmed in three messages that the transfer was in order and authorised. On the basis of these false confirmations the reservation was withdrawn and the instructed amount was credited to the company's account.

[9.45] Subsequently, using an arrest warrant issued by the German authorities, alleging that the applicant had committed an offence under German law, Germany made a request for extradition of the applicant to

the Secretary of State for the Home Department. In response the Home Secretary specified, for the purposes of his order giving authority to proceed with the request under s 7 of the Extradition Act 1989, that the conduct of which the applicant was accused was conduct with, had it occurred in the UK, would have constituted offences of theft and obtaining a money transfer by deception. As a consequence, the applicant was detained in custody at Brixton Prison pursuant to an order for committal made by the Bow Street magistrate to await the Home Secretary's decision on the extradition.

[9.46] On behalf of the applicant it was submitted, *inter alia*, that the conduct alleged in the warrant did not amount under English law to the offence of obtaining a money transfer by deception under the Theft Act 1968, s 15A, as inserted by the Theft (Amendment) Act 1996, s 1. The essence of the argument was: (a) that the conduct alleged did not amount to deception, as (i) the credit transfer process had been automated and a machine could not be deceived, and (ii) the confirmatory messages, having been made after the transfer, were legally irrelevant; and (b) that the German papers did not disclose from which account the funds transferred to ABN Amro Bank had been drawn so that there was no information about the debit. The material parts of s 15A provide as follows:

'(1) A person is guilty of an offence if by any deception he dishonestly obtained a money transfer for himself or another.

(2) A money transfer occurs when—

- (a) a debit is made to one account;
- (b) a credit is made to another; and
- (c) the credit results from the debit or the debit results from the credit.

(3) References to a credit and to a debit are to a credit of an amount of money and to a debit of an amount of money.

(4) It is immaterial (in particular)—

- (a) whether the amount credited is the same as the amount debited;
- (b) whether the money transfer is effected on presentment of a cheque or by another method;
- (c) whether any delay occurs in the process by which the money transfer is effected;
- (d) whether any intermediate credits or debits are made in the course of the money transfer;
- (e) whether either of the accounts is overdrawn before or after the money transfer is affected.

(5) A person guilty of an offence under this section shall be liable on indictment to imprisonment for a term not exceeding ten years.'

[9.47] After the magistrate had rejected the applicant's submissions relating to the above provisions, he applied for a writ of habeas corpus, contending that his detention was unlawful on the ground that the

magistrate's rulings were in error. The Divisional Court reviewed the whole nature of the offence of obtaining a money transfer by deception.

The nature of credit transfers

[9.48] Concerns arose originally in the context of mortgage fraud. Attribution of criminal liability for mortgage fraud arose before the House of Lords in *R v Preddy* [1996] 3 All ER 481. The analysis provided therein revealed serious loopholes with the technical application of the Theft Act 1968, and also the 1978 Act, to those engaged in such conduct. As a matter of extreme urgency the Law Commission reported (no 243) in the aftermath of the decision, and suggested that a suitable panacea could only be achieved through statutory reform. This rectification was put into effect through the major changes introduced by the Theft (Amendment) Act 1996. It is important to examine the gaps identified by *Preddy*, and consider the legislative response to close the stable door on individuals engaged in obtaining money transfers by deception.

[9.49] It is central to an appreciation of the *Preddy* case to recall that the offence under s 15 of the Theft Act requires that the prosecution prove that D dishonestly and by deception *obtained property belonging to another* with intent permanently to deprive that other of it. The definition of property under s 4(1) specifically includes 'things in action and other tangible property'. In *Preddy* the defendants were charged with obtaining or attempting to obtain mortgage advances from lending institutions by deception contrary to s 15(1). The defendants obtained advances secured by mortgages on properties to be purchased by the defendants. In making the applications, the defendants gave false information as to such matters as their names, employment, income or intended use of the property. In cases where the advances were approved, the bank account of the lending institution was debited by the appropriate amount and the bank account of the defendant (or his solicitor) was credited with that amount. These transfers were made either by telegraphic transfer, CHAPS (Clearing House Automatic Payment System), which the House of Lords held was for present purposes the same as telegraphic transfer, or by cheque. The three defendants had argued that they had committed no offence under s 15 because they had intended to repay the loan in full after the sale of the properties at a profit due to the strength of the rising property market. Further, that no property of the lending institutions had been obtained or attempted to be obtained. Their submissions were rejected and they were convicted. They appealed, ultimately to the House of Lords, where the main issue, inter alia, that arose for determination was whether the debiting of a bank account and the corresponding crediting of another's bank account brought about by dishonest misrepresentation amounted to the obtaining of property within s 15. Additionally, whether the position was different if the account in credit, within the mortgage contract, was that of a solicitor acting in the transaction.

[9.50] The Court of Appeal (see [1995] Crim LR 564) had been of the opinion that the central issue was whether the transfers constituted 'property' within s 4(1) and concluded that it was *intangible property* and, therefore, property for the purposes of s 15(1). However, contrary to the analysis of the Court of Appeal, it was held by Lord Goff in the House of Lords that such a credit entry fell within a different part of the s 4(1) definition of property, being a *chose in action* which belonged to an account holder and was exercisable against the institution where the account had been placed. The crux of the appeal thus focused on whether the appellants could be said to have obtained, or attempted to obtain, property (a chose in action) that *belonged to another*. Their Lordships answered this question in the negative. The proper rationale was that the lending institutions credit balance was a chose in action (the debt owed to the institution by the bank) which was extinguished and subsequently the defendant (purchaser) obtained something different, namely the chose in action constituted by the debt owed to him by his bank as represented by a credit in his own bank account. This asset was created for him and had, therefore, never belonged to anybody else. Hence the prosecution were unable to show that the borrower defendant had obtained property 'belonging to another'. Although the property (chose in action) had been obtained at the lender's expense, and been obtained by deception, it was, in essence, the borrower's own property. The House of Lords concluded that the Court of Appeal had missed the crucial issue. Lord Goff demonstrated that s 15 was totally inapplicable to this situation (at 490):

'[W]hen the bank account of the defendant (or his solicitor) is credited, he does not obtain the lending institution's chose in action. On the contrary, that chose in action is extinguished or reduced pro tanto, and a chose in action is brought into existence representing a debt in an equivalent sum owed by a different bank to the defendant or his solicitor ... In truth, the property which the defendant has obtained is the new chose in action constituted by the debt now owed to him by his bank, and represented by the credit entry in his own bank account. This did not come into existence until the debt so created was owed to him by his bank, and so never belonged to anyone else. True, it corresponded to the debit entered in the lending institution's bank account; but it does not follow that the property which the defendant acquired can be identified with the property which the lending institution lost when its account was debited. In truth, s 15(1) is here being invoked for a purpose for which it was never designed, and for which it does not legislate.'

[9.51] Their Lordships identified, in effect, what is intended in the course of a transaction where funds are to be transferred from bank A to bank B. Immediately prior to the transaction a credit balance exists in an investor's account in Bank A – determined to be a chose in action, and, therefore, property. When a sum of money leaves the investor's account of Bank A, his chose of action in respect of that sum is extinguished. The credit balance in the investor's account at Bank A concerns the obligation of his bank to pay the required sum of money. When money is transferred

from the account at Bank A this extinguishes or reduces the financial obligation of Bank A. When an equivalent sum is transferred to Bank B, creating a credit balance in bank B's account, there arises a fresh chose in action being the right to demand payment of this sum, establishing an obligation of a wholly different bank to meet the obligation. Applying these propositions to cases where sums of money are transferred from the lender's account to the account of the borrower (or his solicitor) either by telegraphic transfer or CHAPS, the lender's property, which was the chose of action in respect of the relevant sum, is extinguished and a new chose in action is created belonging to the borrower or his solicitor. Thus, although the borrower has acquired a chose in action in respect of a sum of money of equal value to that which the lender had a right, he has not acquired the property of the lender which was the latter's right against his own bank.

[9.52] The decision in *Preddy* clearly took many by surprise and the importance of the loophole revealed by the decision prompted the Law Commission to publish proposals, in advance of its general review of dishonesty, to deal with the issues raised. The very urgency with which the Law Commission proceeded meant that consultation was very limited, and this, in turn, led the Law Commission to restrict its proposals to the most important gaps exposed by *Preddy*. Several allied suggestions from the consultation process were deferred until the more general review of dishonesty. After reviewing *Preddy* the Law Commission concluded (at para 2.13):

'Although *Preddy* was concerned only with what are called mortgage frauds, the decision of the House of Lords is relevant to all circumstances in which the effect of the dishonest deception by the fraudster (D) is to cause the victim (V) to authorise the debiting of his or her account (thereby extinguishing V's chose in action in whole or in part) and bring about a corresponding credit to D's (or another's) account (thereby creating in D's or another's favour a new chose in action). *Preddy* has therefore exposed a very substantial lacuna in the applicability of section 15.'

[9.53] The proposals of the Law Commission received the Royal Assent as the Theft (Amendment) Act 1996. Initially, the Law Commission sought to rectify the situation by use of existing offences under the Theft Acts. Their report examined a number of alternative extant offences which could fit such conduct, specifically theft under s 1(1), false accounting under s 17, procuring the execution of a valuable security within s 20(2), or evasion of liability by deception contrary to s 2(1) of the Theft Act 1978. None of these adequately reflected the gravamen of the unlawful activity conducted within mortgage fraud. The Law Commission further concluded that it was inappropriate to try to solve the problem by amending existing offences. In the end the Law Commission recommended two new offences, one to deal with the immediate effect of *Preddy*, and the second to tackle associated problems

relating to handling. Additionally, s 1 of the Theft Act 1978 is amended to include loans within the definition of services, thereby reversing *R v Halai* [1998] Crim LR 624.

[9.54] Section 1 of the Theft (Amendment) Act 1996, as examined above, provides a new offence to deal with the *Preddey* type of case. Under a new Theft Act 1968, s 15A, such a person will now be charged with obtaining a money transfer by deception. A money transfer occurs when a debit is made to one account, a credit is made to another and the credit results from the debit or vice versa. The Act provides that it is immaterial, inter alia, whether the amount credited is the same as the amount debited, whether the transfer is achieved by cheque or otherwise, or whether either of the accounts is overdrawn before or after the money transfer is affected. Section 15B(3) and (4) restricts the meaning of an 'account' in effect to one kept with a bank or with a person carrying on a deposit-taking business for the purposes of the Banking Act 1987.

[9.55] It is important to distinguish the effects of *Preddey*, and the subsequent 1996 Act, from a simple case of stealing a credit balance, which arguably transpired in *Re Holmes*. This distinction was made by the Court of Appeal in *R v Hilton* [1997] Cr App R 445, which affirmed that *Preddey* did not apply to theft of a credit balance. The defendant was the chairman of a charitable organisation. He had caused the organisation's bank to transfer sums of money, on two occasions, by sending instructions by facsimile (fax) and on another occasion by writing a cheque. This money had been transferred into his own account and those of D's creditor. D was convicted of theft in relation to these transactions, but appealed on the basis that the convictions were unsafe in the light of the decision in *Preddey*. It was held by the Court of Appeal that it was the defendant's instructions, whether by means of the cheque or the facsimile, which were the essential step which set in motion the inter-bank or inter-account machinery. The offence of theft would still be committed even though the bank was obliged, as debtor to V, to replenish V's account. This followed from *R v Kohn* (1979) 69 Cr App R 395, unaffected by *Preddey*, where it was determined that V has a right to sue the bank where V has a credit balance or overdraft authority which had not been eliminated.

The impact of the decision in Re Holmes

[9.56] The Divisional Court, applying the above principles, held that the writ for an application of habeas corpus be dismissed. The offence of obtaining a money transfer by deception, as enunciated, requires that, in addition to a credit to a bank account, a debit has been made to an account and, further, that the credit resulted from the debit and vice versa. However, it was not essential to identify what particular account had been debited as the concomitant to the credit, provided there was a debiting of an account and the debit was causally connected with the credit.

[9.57] Under English criminal law it remains impossible causally to deceive a machine: see Professor J C Smith *The Law of Theft* (8th edn, 1997) p 97 (para 4-12); and see Professor Edward Griew *The Theft Acts* (7th edn, 1995) p 148 (paras 8-12, 8-13). Their Lordships in *Re Holmes* expressed disquiet that in the modern financial world, with Internet banking and use of PIN numbers and passwords, such computer misuse should equate to the substantive offence of theft or a cognate offence. The apposite charge remains the lesser offence under s 2 of the Computer Misuse Act 1990. In *Re Holmes*, though, an operable deception applied against the mind of human beings. The three messages of confirmation given by the application constituted a causative deception. Despite the fact that these messages were given after the initial transfer, they had legal relevance since the account was not credited while the bank maintained a reservation that precluded any dealing with the funds in question. Stanley Burnton J asserted (at [15]-[17]):

'Section 15A requires that, in addition to a credit to a bank account, there is a debit made to an account, and that the credit results from the debit or vice versa. In the present case, there was no specific evidence that any debit was in fact made. However, the court is entitled to take judicial notice of invariable banking and accountancy practice. In practice, a money transfer could not be made by Commerzbank without a bank account being debited with the amount of that transfer. That bank account may have been a customer's account or its own internal account, and ultimately it may have been with the bank with which it and ABN Amro settled their inter-bank transactions; but some debit of a bank account there must have been; and the debit and the credit must have been causally connected ... In our judgment it is not essential to identify what account had been debited as the concomitant to the credit, or whether the account that was debited was overdrawn or in credit, provided there was a debiting of an account and the debit was causally connected with the credit; and such a debiting there must have been. Accordingly, we are satisfied that the charge of obtaining a money transfer by deception was made out. In these circumstances, it is strictly unnecessary for us to consider the charge of theft. We have not reached a final conclusion on it, but since the matter was fully argued we should state that our provisional view is that for the reasons set out below it too was made out.'

[9.58] Since the decision in this case, reform of fraud law has moved closer with a Fraud Bill introduced in the House of Lords on 25 May 2005. The Bill is based on the proposals of the Law Com no 276, but goes further, and seeks to replace the deception offences in the Theft Acts 1968 and 1978 with a new offence. Fraud is broken down into three main categories: fraud by false representation; fraud by failing to disclose information; and fraud by abuse of position. The issue of deceiving a machine is covered by a new offence under cl 11 of the Bill, obtaining services dishonestly, which closely follows Law Com no 276. The danger remains, however, that the new provisions will simply give rise to a flurry of cases in which the elements of dishonesty are considered. Problems

created by money transfers by deception, highlighted in *Re Holmes*, will continue to exercise judicial minds under the proposed new regime, and may feature in the Review over coming years.

Criminal Procedure and Sentencing

G J BENNETT, MA

Barrister, Professor of Law, University of Notre Dame

CRIMINAL PROCEDURE

Appeal

[10.1] In *R v Connor, R v Mirza* [2004] UKHL 2, [2004] 1 All ER 925 (All ER Rev 2004 at [10.1]–[10.7]) the House of Lords had affirmed the orthodox view that, particularly after a verdict has been returned, an investigation into the deliberations of the jury was beyond the review of an appellate court. Maintaining the secrecy of jury deliberations was important in ensuring both the finality of verdicts and a candid exchange of views to make certain there was a thorough consideration of the evidence. One consequence of the case was a *Practice Direction (Crown Court: Guidance to Jurors)* [2004] 1 WLR 665, which makes clear that jurors should be alerted to the desirability of bringing any concerns about the conduct of fellow jurors to the attention of the trial judge before the case is concluded. Writing instead after the trial to a third party, such as the defendant's mother, can amount to a contempt of court, as the House of Lords made clear in *A-G v Scotcher* [2005] UKHL 36, [2005] 3 All ER 1. The subsequent decision of the House in *R v Smith* [2005] UKHL 12, [2005] 2 All ER 29 considers how a judge should react to a juror's expression of concern (see also [7.3]–[7.6] above).

[10.2] The issue arose when the judge received a letter from a juror stating that some jurors were disregarding the judge's directions on the law, indulging in speculation and improperly horse-trading over verdicts. Influenced by tactical considerations, counsel for the defendants agreed with the trial judge's proposal to give a further direction exhorting the jurors not to be bullied and to decide the case on the evidence and with regard to the burden of proof. In the event the jury returned guilty verdicts on all counts. On appeal the Court of Appeal had taken the view that the provisions of s 8 of the Contempt of Court Act 1981 precluded an investigation into irregularities alleged to have occurred in the jury room. This view was subsequently rejected by the House of Lords as part of the decision in *Connor*. The issue therefore came before the House of what sort of inquiry could properly be made by a judge in response to a juror's claim of irregularity in the consideration of a case and, in particular, to what extent it was permissible to question jurors about what had taken place in the course of their deliberations.

[10.3] Clearly there is a difficulty in reconciling the principle of respecting the secrecy of the jury room with the need of a court to ascertain what has gone wrong and to rectify the problem. The response of the House of Lords in *Smith* does not depart from the basic principles laid out in *Connor*, although it does help to fill in some of the details which might usefully have been explored in the earlier case. In particular, Lord Carswell (at [16]) identifies six principles governing the law relating to inquiry into the verdicts of juries. On the facts of this case the trial judge was said to have taken the correct approach in not questioning the jurors on the contents of the letter which would inevitably have involved asking them about the subject of their deliberations. In view of the nature of the complaints of misconduct, questioning jurors would have been liable to make things worse. Given the choice of either discharging the jury or giving them further directions the judge had acted reasonably in taking the latter course, although the appeal was allowed on the basis that the judge's directions had been insufficiently strong and emphatic on the need to follow the court's directions, adhere to the evidence presented and decide on verdicts without bargaining.

[10.4] It is likely that Lord Carswell's six principles will need to be explored in subsequent case law and the House was unwilling to draw up a precise definition of the situations in which it would be proper for a judge to question jurors. One example of just such a possible case (at [20]), which surely cannot be long in coming, is an allegation that a juror had used a mobile telephone in the jury room. Not surprisingly, the use of material gained from the Internet has already been considered, in *R v K* [2005] EWCA Crim 346, [2005] All ER (D) 227 (Feb). There the Court of Appeal quashed a conviction where a jury bailiff discovered annotated material downloaded from the Internet after the jury had returned a verdict. Although the case is largely reported on the issue of witness training, *R v Momodou* [2005] EWCA Crim 177, [2005] 2 All ER 571 also serves as an example of how a judge might properly react to a complaint that fellow jurors were prejudiced and discriminatory in their deliberations. (See also [7.7] above and [13.27]–[13.28] below.)

[10.5] In 2005 the Department for Constitutional Affairs did put out for consultation the whole issue of academic research into jury deliberations and whether the law relating to the secrecy of jury deliberations should be amended to facilitate appeals based upon jury impropriety. The response (which can be found at www.dca.gov.uk/consult/juryresearch_research_response1109.pdf) has confirmed the government in its belief that the only practical way to deal with jury impropriety is to continue to let the common law develop on a case-by-case basis. One reason given is the difficulty of identifying every impropriety which an appeal court should be empowered to investigate without inviting large numbers of unmeritorious appeals.

Compensation

[10.6] The Divisional Court's holding in *R (on the application of Murphy) v Secretary of State for the Home Dept* [2005] EWHC 140 (Admin), [2005] 2 All ER 763 confirms how exacting are the criteria which a claimant has to satisfy in order to receive compensation under s 133 of the Criminal Justice Act 1988.

[10.7] The claimants' convictions for murder were quashed in 2002 following a reference by the Criminal Cases Review Commission. Their case was based on the fact that evidence of the victim's possession of a gun was presented at the trial as a late invention whereas, in reality, there was information from other witnesses of such possession that was not fully disclosed at the time of trial. Although much of the case is concerned with the details of evidence in the case, a number of general points emerge. First, the reference to a 'new or newly discovered fact' in s 133(1) of the 1988 Act was construed to mean a fact that only emerges after the ordinary appellate process has been exhausted. In this case there had been disclosure of the material between trial and a first unsuccessful appeal and this alone was sufficient to dispose of the claim. The consequence, as the court noted (at [59]), is that a recognition that an earlier dismissal of an appeal was even palpably erroneous could still leave a claimant bereft of compensation under the 1988 Act. A second reason for rejection of the claim was based on the interpretation of the requirement that the conviction was quashed 'on the ground that' a newly discovered fact showed that there had been a miscarriage of justice. This was construed to mean that it must be the principal, if not the only, reason for quashing the conviction. Only then could it be said that the new or newly discovered fact showed beyond reasonable doubt that there had been a miscarriage of justice. In this case, it was said, the Court of Appeal's decision was based on the totality of the evidence and the undisclosed material had not been a determinative or paramount consideration.

[10.8] On one important matter of general principle the court found it unnecessary to express a view. In *R (on the application of Mullen) v Secretary of State for the Home Dept* [2004] UKHL 18, [2004] 3 All ER 65 (All ER Rev 2004 at [10.13]–[10.15]) Lord Bingham tentatively, and Lord Steyn more emphatically, expressed differing approaches to the issue of whether a finding of factual innocence was required by s 133. This question, in some ways the most interesting issue of general principle inherent in the statutory scheme, still remains entirely open.

Indecent assault

[10.9] The Court of Appeal's decision in *R v J* [2002] EWCA Crim 2983, [2003] 1 All ER 518 (All ER Rev 2003 at [10.1]–[10.4]) was reversed by the House of Lords ([2004] UKHL 42, [2005] 1 All ER 1). The result is that a charge of indecent assault under s 14(1) of the Sexual Offences Act 1956

cannot be used to circumvent the 12-month limitation period for the offence of intercourse with a girl under 16 under s 6(1) of the same Act.

[10.10] Despite a spirited dissent by Baroness Hale, which draws attention to some of the social policy behind the legislation and the difficulty of extracting principle from the ‘mess’ of the 1956 Act, a majority of their Lordships had no hesitation in departing from the view of the Court of Appeal. Unlike the lower court, the House of Lords based its decision not on the issue of abuse of process but on the more fundamental point that the statutory construction of the legislation proscribed the bringing of such a charge. Their view was that Parliament could not have intended to prohibit a prosecution under s 6 after the lapse of 12 months if exactly the same conduct could thereafter be prosecuted under s 14. Any other result would enable the parliamentary intent to be evaded by manipulation of the indictment.

[10.11] Several of their Lordships were at pains to point out that they were not dealing with the different situation of an offence under s 14 being returned as an alternative verdict. This was precisely the issue in *R v Timmins* [2003] EWCA Crim 3549, [2003] All ER (D) 196 (Nov). Here the defendant was charged with rape of a girl under 16 but the jury clearly accepted the defendant’s account that the intercourse had been consensual. The Court of Appeal took the view that, since the prosecution was never *commenced* as either a s 6 or s 14 offence, the limitation period did not apply. The prosecution commenced and continued until the verdict as a prosecution for rape. The judge had therefore been correct to rule that the alternative verdict of indecent assault on a female was available.

[10.12] Fortunately, the problem raised in *R v J* has now been addressed by the Sexual Offences Act 2003. The time limit for offences of this kind was abolished by s 140 and Sch 7 to the 2003 Act. The importance of the decision is therefore limited to cases which predate the 2003 Act, which is not retrospective.

Jury

[10.13] One of the recommendations of Auld LJ in his *Review of the Criminal Courts of England and Wales* (2001) was the removal of categories of ineligibility for jury service based upon occupation. This recommendation was effected by the Criminal Justice Act 2003 and reflected Parliament’s intention to widen the range of those eligible for jury service to include those concerned with the administration of justice. Accordingly, the issue in *R v Abdroikov* [2005] EWCA Crim 1986, [2005] 4 All ER 869, which was bound to arise at some point, was whether the presence of a police officer or an employee of the Crown Prosecution Service on the jury meant that the trial was unfair because of actual or apparent bias.

[10.14] Whilst it may have been inevitable that such a claim would be made, it seems equally inevitable that a court would reject it. Lord Woolf makes clear that the presence of a police officer or CPS employee on a jury did not in itself offend principles of fairness. Such persons served in the same way as any other randomly selected member of the public and could be expected to comply with their jury oath and the judge's directions. He did, however, express (at [30]) the hope that those employed in the administration of justice would be careful not to act in a manner inconsistent with their duty as members of the jury and particularly to be on their guard to reach their verdict only on the evidence presented in accordance with the judge's directions.

Irregularity

[10.15] See [10.1]–[10.5] above.

Magistrates

Adjournment

[10.16] The power of magistrates to adjourn a hearing for a closure order under s 2(3) of the Anti-Social Behaviour Act 2003 fell to be considered by the Administrative Court in *Metropolitan Police Commissioner v Hooper* [2005] EWHC 340 (Admin), [2005] 4 All ER 1095.

[10.17] Mitting J makes the point that a purpose of the 2003 Act was to provide a speedy process to close down premises that could be colloquially described as 'disorderly crack houses'. The court had power under s 2(6) of the Act to adjourn the hearing of the application for an order for a period of no more than 14 days to enable persons, such as the occupier of the premises, to show why such an order should not be made. Section 2(7) enabled the court, under these circumstances, to make an order that the closure notice was to continue until the end of the period of adjournment. The more general power to adjourn a hearing under s 54 of the Magistrates' Courts Act 1980 should therefore only be used exceptionally, when there was no other way to protect a person's rights under the European Convention, since the power under s 2(7) was not then available. This meant that the court would deprive itself and the police of a valuable weapon to ensure that premises were speedily closed. If a bench, as in this case, found itself unable to proceed within the statutory time frame magistrates should have in mind the possibility of adjourning the case to another bench.

Jurisdiction

[10.18] Greater involvement by shareholders in the affairs of public companies has been a feature of recent years. This trend gives an added significance to the Divisional Court's decision in *R (on the application of*

Gladstone plc) v *Manchester City Magistrates' Court* (*Guiver, interested party*) [2004] EWHC 2806 (Admin), [2005] 2 All ER 56.

[10.19] Mr Guiver, a minority shareholder in Gladstone plc, allegedly kned the chief executive in the groin at the company's annual general meeting. The company decided it should be resolute in its approach to shareholders who acted in such a way and, with the chief executive, instructed their solicitors to commence proceedings for assault. When the matter came before the district judge, Mr Guiver submitted that the information was invalid in that the company had no locus to lay the information. The district judge agreed, taking the view that the only person entitled to lay the information was the aggrieved individual, namely the chief executive, and not a body corporate. On an application for judicial review the court quashed the decision of the district judge.

[10.20] Leveson J elegantly condensed the ponderous language of *Stone's Justices Manual* by stating that any person may lay an information, but that there is (at [11]), 'a requirement that the prosecution establish a public interest and benefit, as opposed to a purely private interest in criminal proceedings'. The annual general meeting of a public company is an important aspect of the governance of that company and it is in the public interest that such meetings are conducted in an orderly manner. There was no reason for concluding that there is insufficient public interest to justify a company, if it may, instituting criminal proceedings. In the instant case the company had within its objects the power to manage and control the company, including holding annual meetings, and that included the ability to control order at those meetings. Accordingly, the company did have the power to institute a prosecution in a case of this kind. The solicitors had been authorised to lay the information and the information laid was valid.

[10.21] One of the changes introduced by s 29 of the Criminal Justice Act 2003 (albeit not in force at the time of writing) is a new method of instituting proceedings by way of a 'written charge'. This, however, only applies to 'a public prosecutor' so will not affect the availability of laying an information in a private prosecution.

Proceedings

[10.22] Since anti-social behaviour orders (ASBOs) made under the Crime and Disorder Act 1998 often contain what amount to curfew orders the point of principle argued in *R (on the application of Lonergan) v Lewes Crown Court and another* (*Secretary of State for the Home Dept, interested party*) [2005] EWHC 457 (Admin), [2005] 2 All ER 362 is of some practical significance.

[10.23] The Divisional Court was faced with a claim that such orders were unlawful on the grounds that, first, they were in substance mandatory not prohibitive and, secondly, that, in reality, a curfew is a

penalty. Maurice Kay LJ gave the first argument short shrift. The curfew condition was said not to be a mandatory obligation expressed in a negative way. The answer to the second argument was to be found in *R (on the application of McCann) v Crown Court at Manchester* [2002] UKHL 39, [2002] 4 All ER 593 (All ER Rev 2002 at [10.30]–[10.32]). In that case the House of Lords decided that an ASBO is made in proceedings which are civil, not criminal. A curfew order under the 1998 Act, as opposed to one imposed under s 37 of the Powers of Criminal Courts (Sentencing) Act 2000, was preventative and protective, not penal. The content and duration of an ASBO was conditioned solely by what was necessary to protect members of the public from further anti-social behaviour

[10.24] Whilst, therefore, confirming the legality of curfew orders made under an ASBO, the court did make one important qualification to their imposition. Given that an ASBO runs for a minimum of two years, a curfew for that length of time is a very considerable restriction of freedom for a teenager. Magistrates should, therefore, consider carefully the need for, and duration of, a curfew. It may be necessary in many cases to set the period of curfew at less than the full life of the order or, in the light of behavioural progress, vary the curfew order under s 1(8) of the 1998 Act.

Witness summons

[10.25] Under Sch 3 to the Crime and Disorder Act 1998, magistrates have an ancillary power, when cases are sent to the Crown Court under s 51 of the Act, to take a deposition from a witness. This provision is aimed at those who are not otherwise willing to make a voluntary statement and it can be enforced by an arrest warrant or the imposition of a fine or imprisonment upon those who refuse to co-operate. Unfortunately, the various statutory provisions that deal with the situation are unclear on exactly what form the proceedings should take and it is entirely understandable that magistrates may have had difficulty in making sense of them. The decision of the Divisional Court in *R (on the application of the Crown Prosecution Service) v Bolton Magistrates' Court* [2003] EWHC 2697 (Admin), [2005] 2 All ER 848 is therefore welcome in giving guidance on how magistrates should approach the taking of depositions.

[10.26] First, such proceedings should be in open court in accordance with the general principle that justice should almost always be done in public. This would seem to be something of a difficulty in the context of witnesses who have already shown themselves to be reluctant, but the court places confidence in the power of the magistrates exceptionally to exclude persons, or otherwise modify their procedure, where that would assist in the reception of evidence. There is said to be no basis, however, for excluding the CPS and representatives of the investigating authority. Kennedy LJ also expresses the opinion that cross-examination of a

witness, although it should normally be reserved for the Crown Court, might be permitted where, for example, the reluctant witness is likely to be unavailable at the Crown Court or can be spared attendance by being asked one or two questions. The delicacy of making a judgment on the scope of cross-examination is, however, surely considerable. Again, given that the witness is reluctant to begin with one can wonder what the possibility of cross-examination will do for the enthusiasm of the witness to co-operate. In addition, as the court explicitly recognised, the purpose of s 51 of the 1998 Act was to avoid contested transfers.

[10.27] The second point emphasised by the court is less problematic and more readily in accordance with established principles. Where a witness claims the privilege against self-incrimination it is not enough, as appears to have happened in this case, to accept the conclusion of the solicitor acting for the witness. The duty to investigate is non-delegable. Magistrates should satisfy themselves in respect of each and every question asked that there was a reasonable ground to apprehend a real and appreciable danger to the witness of self-incrimination in answering the question.

Trial

Direction to jury

[10.28] For those who still believe in the institution of trial by jury the decision of the House of Lords in *R v Wang* [2005] UKHL 9, [2005] 1 All ER 782 might be thought to be a source of satisfaction, if not celebration. The simple question posed to their Lordships was, in what circumstances, if any, is a judge entitled to direct a jury to return a verdict of guilty? The unanimous answer given was, never. Whilst this response should hardly come as a surprise, it is a reflection of the beleaguered state of jury trial in our current system of criminal justice that a case should have to get to the House of Lords to remind us of this basic principle.

[10.29] The story began at Clacton-on-Sea railway station where Mr Wang had his bag stolen. When it was recovered, the police found a sword and a knife in his bag, which led to him being charged with two counts of having an article with a blade or point in a public place, contrary to s 139(1) of the Criminal Justice Act 1988. There was no issue at the trial about the defendant's possession of the knife and the sword. The appellant, however, testified that he was a Buddhist who practised Shaolin, a traditional martial art. On the day in question he was on his way to see his solicitor and had taken the weapons with him because he did not like to leave them where he was staying in Clacton and he liked to stop at remote and uninhabited places to practise Shaolin. At the end of the defence case, and before speeches, the judge sent the jury out and informed counsel that he could see no defence. Counsel for the defence indicated that his client was relying on s 139(4) and (5) of the 1988 Act

which provides a defence of having the article for good reason or for religious reasons. The judge nevertheless recalled the jury and directed them to return guilty verdicts on both counts. The Court of Appeal affirmed the conviction on the basis that the appellant had an evidential burden to discharge, in order to raise the statutory defence, and he had failed to discharge that burden.

[10.30] There is no shortage of well-known cases to support the decision of the House of Lords that judges do not have a power to direct a verdict of guilty. The starting point is clearly *Bushell's Case* (1670) 1 Mod Rep 119, 86 ER 777, where it was famously held that a judge could not punish jurors for not finding the 'right' verdict. In more modern times, *Woolmington v DPP* [1935] AC 462, [1935] All ER Rep 1, *Chandler v DPP* [1962] 3 All ER 142 and, perhaps most significantly, *DPP v Stonehouse* [1977] 2 All ER 909 all resoundingly pointed in the same direction. There have always been cases where, notwithstanding the evidence, the jury have acquitted and the House alluded to the cases of *R v Ponting* [1985] Crim LR 318 and *R v Central Criminal Court, ex p Randle and Pottle* [1992] 1 All ER 370 as examples. In the former, it will be remembered, a civil servant was acquitted after blowing the whistle on the deception of Parliament by government ministers. In the latter case the defendants had admitted in a book their part in assisting the escape of the spy George Blake some 25 years before. It was therefore quite clear that, whilst a trial judge could withdraw a defence from the jury when there was no evidence to support it, and even give a clear indication of his views of the merits, he could not take the ultimate step of directing a guilty verdict.

[10.31] Of course, there have always been voices of dissent from this position and undoubtedly the most important recent contribution to the debate has been that of Auld LJ in his *Review of the Criminal Courts of England and Wales Report* (2001). He comments (at paras 105, 107):

'It is a blatant affront to the legal process and the main purpose of the criminal justice system – the control of crime ... the law should be declared, by statute if need be, that juries have no right to acquit in defiance of the law or in disregard of the evidence.'

The central problem, surely, with this approach is that it fails to take account of what, on one view, is one of the most important qualities of jury trial. At the end of the day it acts as a check on potentially unjust or harsh laws and the abuse of prosecutorial powers.

[10.32] The last word, according to their Lordships (at [16]), was that of Lord Devlin in his Hamlyn Lectures, *Trial by Jury* (8th series) pp 160, 162, who argues that the jury is:

'... an insurance that the criminal law will conform to the ordinary man's idea of what is fair and just. If it does not, the jury will not be a party to its enforcement ... The executive knows that in dealing with the liberty of the subject it must not do anything which would seriously disturb the conscience

of the average member of Parliament or of the average jurymen. I know of no other real checks that exist today upon the power of the executive.'

[10.33] One must wonder what the point is of even considering directing a guilty verdict if the facts have to be so extreme to justify such a decision that surely the jury is likely to come to the same conclusion unaided. For what it is worth, the House of Lords considered (at [17]) that the jury in *Wang* would very likely have convicted if the case had been left to them after being directed in the ordinary way. Even if the decision of the House of Lords had gone the other way the practical impact would have been limited but the unanimous and principled approach of the House is at least of significant symbolic value in affirming the central values of jury trial.

Irregularity

[10.34] See [10.1]–[10.5] above.

Plea

[10.35] The Court of Appeal's landmark decision in *R v Goodyear* [2005] EWCA Crim 888, [2005] 3 All ER 117 abandons the approach taken by courts for the last 35 years and permits judges to give an indication of sentence when requested to do so by the defendant.

[10.36] Whatever really went on between judge and counsel before *R v Turner* [1970] 2 All ER 281, that decision at least made clear that a judge should not give any indication as to possible sentence unless it was to say that, regardless of plea, the sentence would, or would not, take a particular form. Whilst counsel could certainly advise defendants as to the sentencing implications of a plea, the rule meant that a defendant could not get an authoritative answer to perhaps the most important question of all, namely, how long will I get? This situation appears to have satisfied nobody and in 1993 Professor Michael Zander, in submitting evidence for the Runciman Royal Commission on Criminal Justice, found that 86% of prosecution barristers, 88% of defence barristers and 67% of judges thought that the *Turner* guidelines should be reformed to allow realistic discussions of plea and sentence between judge and counsel. Most recently, the Auld Review recommended that a defendant should be able to get an indication from the judge so as to evaluate the advantages, or otherwise, of proceeding with a plea. A further statutory deviation from the *Turner* principles has been enacted by the Criminal Justice Act 2003. In the case of offences triable either way the accused is now entitled to request an indication of sentence from the magistrates if he were to be tried summarily and plead guilty. Clearly, as Lord Woolf CJ comments (at [47]), this all adds up to 'a very different culture to that which obtained when *R v Turner* was decided'.

[10.37] The court sets out very detailed and helpful guidelines, but there are a number of central principles. An indication should only be given if

one has been sought by the defendant and a judge is free to refuse or postpone doing so. Once an indication has been given, it is binding on the judge who has given it and any other judge who becomes responsible for the case. If the defendant does not then plead guilty, the indication will cease to have effect. The process of seeking a sentence indication should normally be initiated by the defendant. The defendant's advocate should seek signed written authority before doing so. Any sentence indication remains subject to the Attorney General's power to refer an unduly lenient sentence, which the defendant must understand. Any agreed basis of the plea should be reduced into writing. A judge should never be invited to give an indication on the basis of different pleas such as might arise under ss 18, 20 and 47 of the Offences Against the Person Act 1861. Any sentence indication will normally be sought at the plea and case management hearing. The hearing should take place in open court with all parties present. Reporting restrictions should normally be imposed, to be lifted when the defendant pleads or is found guilty.

[10.38] This radical change to procedure has been generally welcomed and seems very likely to achieve its aim of encouraging appropriate pleas of guilty without putting unfair pressure on the accused. Clearly, such a significant reform is likely to throw up a range of new issues. No doubt for this reason the new arrangements were thought to be impracticable for use in the magistrates' courts but it is difficult to see why they should not eventually be adopted there as well.

Practice directions

[10.39] The issues of hearing fraud, forms, jury service and case management have all been the subject of one protocol and three Practice Directions.

[10.40] There has been concern recently that some fraud trials have extended for periods much longer than was either necessary or desirable to achieve their objects. In *Protocol for the control and management of hearing fraud and other complex criminal cases* [2005] 2 All ER 429, Lord Woolf CJ lays down detailed practical guidelines for the management of such trials. To enable juries to retain the evidence they have heard trials should not be allowed to continue for too long. Save in exceptional circumstances, the suggested maximum upper limit is six months. The protocol is primarily directed at trials which are likely to last eight weeks or longer and the intention is to keep it up to date with any further practices found to be successful in the management of complex cases.

[10.41] A Practice Direction *Amendment to the Consolidated Criminal Practice Direction (forms for use in criminal proceedings)* [2005] 2 All ER 916 sets out the forms to be used following the coming into force of the new Criminal Procedure Rules 2005 on 4 April 2005.

[10.42] The changes in the composition of juries brought about by s 321 of the Criminal Justice Act 2003 has already been noted (see [10.13] above). One further consequence of this reform is that there will be an increase in the number of jurors with professional and public commitments who may find themselves in difficulties serving on a jury. The Practice Direction *Amendment to the Consolidated Criminal Practice Direction (jury service)* [2005] 3 All ER 89 sets out guidelines for judges on how to deal with this situation. It is made clear that, whilst the normal presumption is that everyone will be required to serve on a jury when summoned to do so, applications for excusal should be dealt with sensitively and sympathetically. The trial judge should always seek to meet the interests of justice without unduly inconveniencing any juror.

[10.43] A further Practice Direction, *Amendment to the Consolidated Criminal Practice Direction (case management)* [2005] 3 All ER 91, applies to the sending, committal or transfer of cases by magistrates' courts to the Crown Court after 4 April 2005 and to the subsequent management of those cases in the Crown Court.

Preparatory hearing

[10.44] In *A-G's Reference (No 1 of 2004)* [2004] EWCA Crim 1025, [2005] 4 All ER 457 (note) Lord Woolf CJ sets out guidance in relation to preparatory hearings under the Criminal Procedure and Investigations Act 1996. (See also [13.8] below.)

[10.45] The decision to order a preparatory hearing effectively starts the trial, as indicated in *Re Kanaris* [2003] UKHL 2, [2003] 1 All ER 593 (All ER Rev 2003 at [10.22]–[10.24]). It also identifies the trial judge and raises the risk of delay due to interlocutory appeals to the Court of Appeal. Accordingly, the decision whether to proceed to a preparatory or pre-trial hearing requires close attention to the factors set out in s 29 of the 1996 Act. Resort to a preparatory hearing is only permissible where the case is complex or likely to lead to a lengthy trial. Consideration of the indictment on its own cannot enable the judge to evaluate all the criteria of s 29. A judge is entitled to consider the evidence and make his own judgment as to whether he should order a preparatory hearing. If a judge has addressed the relevant issues and decided to proceed with a preparatory hearing, the Court of Appeal will be reluctant to set aside such a judicial assessment.

Young offender

[10.46] In *R (on the application of R) v Durham Constabulary* [2005] UKHL 21, [2005] 2 All ER 369 the House of Lords reversed the decision of the Divisional Court ([2003] 3 All ER 419; All ER Rev 2003 at [10.25]–[10.28]).

[10.47] Lord Bingham made clear that a warning given under s 65 of the Crime and Disorder Act 1998 did not involve the determination of a

criminal charge against a person within art 6(1) of the European Convention. It was no part of the duty of a police officer, who had to decide whether it would be in the public interest for an offender to be prosecuted or warned, to determine whether the offender was guilty or not. A process, such as a warning under the 1998 Act, that could only culminate in measure of a preventative, curative or welfare- promoting kind would not ordinarily be such a determination. The recording of a warning on the police national computer and the sex offenders register was not a public declaration of guilt as access to the computer and register was restricted to a limited number of authorised persons.

[10.48] Whilst the decision of the House was unanimous, both Lord Steyn and Baroness Hale expressed misgivings about the disposal of the case. The core issue, as Baroness Hale identified (at [29]), was whether it was fair to subject a child to a formal diversionary process with mandatory legal consequences, in this case being placed on the sex offenders register, without first obtaining the child's informed consent. It is quite clear, and hardly surprising, that both the child and stepfather were left with a considerable sense of injustice. As she puts it later in her speech (at [45]), reprimands and warnings do carry consequences which the child and many others might consider punitive. Even if placing details on the police national computer is not a public pronouncement of guilt, it is the widespread dissemination of the knowledge of that guilt. At least if the police adhere to the revised guidance issued on the operation of such warnings, which includes a requirement that the child and parents or appropriate adults have access to information about the warning scheme and its consequences, the unsatisfactory outcome of this case ought not to be repeated.

SENTENCING

Confiscation order

Postponement of proceedings

[10.49] Issues connected with a court's power to postpone confiscation proceedings under s 72 of the Criminal Justice Act 1988 have given rise to a significant body of technical case law which has been reflected in the pages of this Review (see eg All ER Rev 2003 at [10.32]–[10.38]; All ER Rev 2004 at [10.41] [10.45]). All of it should, hopefully, one day pass into history, since the Proceeds of Crime Act 2002 has replaced the 1988 Act with new provisions. In particular, the period of postponement is now two years, not six months as under the 1988 Act. Nevertheless, the old legislation will still be relevant for some time since the 2002 Act is not retrospective.

[10.50] Two significant decisions of the House of Lords in conjoined appeals, *R v Soneji* [2005] UKHL 49, [2005] 4 All ER 321 and *R v Knights* [2005] UKHL 50, [2005] 4 All ER 347, continue the trend towards giving the scheme of the legislation a purposive construction, enabling the courts to recover the proceeds of crime, rather than allowing technical procedural imperfections to render entire proceedings invalid.

[10.51] In *Soneji* the Court of Appeal had quashed confiscation orders on the basis that the six-month period provided by s 72A(3) of the 1988 Act had elapsed before the orders had been made and, in the absence of a finding of exceptional circumstances, the court had no jurisdiction to make them. A unanimous House of Lords rejected this interpretation of the undoubtedly opaque legislative provisions and upheld the Crown's appeal.

[10.52] The core difficulty in interpreting the legislation, which is not a novel situation, is what to do where Parliament appears to cast its command in imperative form without identifying the consequences of a failure to comply. Lord Steyn, giving the leading speech, charts the movement away from a rather mechanical dichotomy of analysing provisions as either mandatory or directory and towards an attempt to discern the real intention of Parliament. In particular, does Parliament really intend the consequences of non-compliance to be total invalidity? In this case the view of their Lordships was, clearly not. Applying this overriding principle to the case, Lord Steyn (at [24]) came to the conclusions that: one is here dealing with confiscation, not the definition of crime, so a purposive approach is justified; where necessary, the courts could always consider abuse of process to ensure time limits are effective; and that there was no significant prejudice to the defendants. There was also said to be a decisive public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process. In giving concurring opinions, Lord Carswell displayed a little more sympathy for the mandatory/directory dichotomy. Lord Brown alone makes the entirely, with respect, plausible point (at [76]–[80]) that the six-month limit may be there not so much for the benefit of the defendant as to ensure the early disgorgement of the offender's gains, a further reason for thinking Parliament in the present case did not intend the proceedings to be rendered invalid because the six-month time limit had been exceeded. There was also agreement that there was no parallel common law jurisdiction to adjourn confiscation proceedings but that the expression 'exceptional circumstances' should not be strictly construed.

[10.53] Given their earlier decision, the conclusion reached by their Lordships in *Knights* naturally follows. In this case the slightly different issue was whether precise periods of postponement had to be specified to conform with the statutory scheme. Lord Brown stated that, provided the judge had acted in good faith in purported exercise of his powers under

s 72A of the 1998 Act, the judge was required to specify the particular period of postponement but he was not bound to specify the very date when the substantive hearing was to begin, still less the date when the actual order would be made. It was sufficient to give directions for the service of statements and to specify a date when the proceedings were next to be listed, whether for a further or final hearing. Only if the timetable initially set made it likely that the six-month limit would be exceeded need the court, on the first postponement, address itself to the question of whether exceptional circumstances existed to justify the directions proposed.

Proceeds of crime

[10.54] If a somewhat generous interpretation of the statutory provisions could be said to have characterised the last two cases, the same could not be said of *R v May* [2005] EWCA Crim 97, [2005] 3 All ER 523, which deals with a number of significant issues under s 71 of the 1988 Act.

[10.55] The defendants had been involved in a major fraud achieved by creating a number of limited companies solely for the purpose of dishonestly retaining and reclaiming VAT. These companies had been jointly controlled by various of the defendants. An added complexity in the case was that some of the evidence against them had been acquired by surveillance. The result was that there were a number of ex parte hearings in which the judge upheld the Crown's claim of public interest immunity (PII) for some of the information gathered by the prosecution. Two principle issues accordingly fell to be considered, namely: (i) had the judge been correct in his handling of the PII information and hearings; and (ii) how should the court ascertain the benefit obtained by each individual in the context of their joint control of the relevant companies?

[10.56] The Court of Appeal held that, in relation to (i), where a judge was confident that he could put undisclosed material out of his mind, he was neither obliged to recuse himself nor appoint special counsel. There was no reason not to accept the judge's statement that he had ignored the undisclosed material in making a decision on the confiscation order. On (ii), Keene LJ confirmed that each person who had joint control of property had 'obtained' the property within the meaning of s 71(4) of the 1988 Act. It was said to be well established that money which had passed through a defendant's hands was to be treated as his benefit even though it was much more than any personal profit he derived from the dealing. As the court put it (at [36]):

'If he obtains property within the meaning of s 71(4), it matters not that he does so merely as a collector or distributor for others involved in the offence: it is the obtaining, not the retention, which matters.'

[10.57] The strict view taken of the approach to 'benefit' under s 71 of the 1998 Act is in accordance with earlier authority, such as *R v Smith*

(*David*) [2001] UKHL 68, [2002] 1 All ER 366 (All ER Rev 2002 at [10.47]–[10.48]) and was followed in the slightly later Court of Appeal decision in *R v Richards* [2005] EWCA Crim 491, [2005] All ER (D) 69 (Mar). Perhaps the most draconian recent application of the principle is *R v Alagobola* [2004] EWCA Crim 89, [2004] All ER (D) 164 (Jan). There the defendant allowed his bank account to be used for a transaction which involved the money being paid simply into and then out of his account. He was nevertheless treated as if all the money that passed through his account had been received as a benefit for the purposes of the 1998 Act.

Realisable property

[10.58] In *R v Ahmed* [2004] EWCA Crim 2599, [2005] 1 All ER 128 the court had to consider ‘the amount that might be realised’ under s 71(6) of the 1998 Act. The judge, in making a confiscation order, took into account the defendants’ half shares in their respective matrimonial homes having accepted evidence that the homes would probably have to be sold to meet the terms of the order. The defendants appealed on the basis that a judge had a discretion whether to include the value of these assets and that he had exercised it wrongly. They argued that including a share of the matrimonial home in these circumstances contravened art 8 of the European Convention in that it violated the rights of innocent members of the defendants’ families.

[10.59] It will come as no surprise to anyone who has viewed the tenor of the recent cases in this area that the defendants lost on both counts. The Court of Appeal held that the most recently amended version of the 1998 Act made clear that there was no discretion at all. Once a court had concluded that the defendants had benefited from criminal activity, and calculated its extent, all that was left was an application of the provisions of s 74 of the Act. It had then merely to concern itself with the arithmetic exercise of computing what amounted to a statutory debt. That did not involve any assessment of how the debt might ultimately be paid. The court did, however, agree that different considerations might arise if the prosecution subsequently took enforcement action. The request for an order to sell the matrimonial home could engage rights under art 8 and at that stage a court would have to consider whether an order for sale would be proportionate.

Mandatory life sentence

[10.60] The holding of the Divisional Court in *R (on the application of Hammond) v Secretary of State for the Home Dept* [2004] EWHC 2753 (Admin), [2005] 4 All ER 1127 has now been overtaken by the decision of the House of Lords ([2005] UKHL 69, [2006] 1 All ER 219). The case is of significance to all those sentenced to mandatory life imprisonment and caught by the transitional provisions contained in the Criminal Justice

Act 2003. In particular, it deals with those sentenced before 18 December 2003 whether or not their tariff had been fixed and notified by the Home Secretary. (See also [20.4] below.)

[10.61] Following the decision in *R (on the application of Anderson) v Secretary of State for the Home Dept* [2002] UKHL 46, [2002] 4 All ER 1089 (All ER Rev 2002 at [10–52]–[10–56]), which decided that it was unlawful for the Home Secretary to fix the tariff term for those convicted of murder, legislation was put in place by the Criminal Justice Act 2003 to deal with the consequences. This included a provision whereby ‘existing prisoners’ have their tariff reviewed or set by a High Court judge but ‘without an oral hearing’. The claimant argued that the lack of an oral hearing contravened his rights under art 6(1) of the European Convention. The Home Secretary’s view was that the existence of an appeal to the Court of Appeal, where there could be an oral hearing, meant that the proceedings as a whole did satisfy the requirements of art 6(1).

[10.62] Both the Court of Appeal and the House of Lords were clear that the denial of a right to an oral hearing in these circumstances was incompatible with Convention rights. As Lord Rodger notes (at [31]), sentencing in secret is one of the most obvious abuses art 6 was designed to root out. The right to an appeal was not enough to cure the defect. The Court of Appeal’s solution was to read the legislation as subject to an implied condition that a High Court judge could hold a hearing where he considers it necessary. Since neither side challenged this proposition in the House of Lords, it was accepted, but strictly speaking not actually decided, by the House that this was the consequence of their decision. Nevertheless, it was said, in the unique situation with which this appeal was concerned, fairness would not, in many cases, require an oral hearing which many existing prisoners might in any event waive.

[10.63] These transitional provisions will ultimately be overtaken by the current procedure whereby the tariff term is set by the trial judge at the conclusion of the trial as part of the sentencing exercise in the ordinary way.

Plea

[10.64] See [10.35]–[10.38] above.

Restraint order

[10.65] The Court of Appeal’s decision in *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, [2005] 4 All ER 391 is concerned with restraint orders under the Criminal Justice Act 1988, although the general principles enunciated will apply equally to the equivalent provisions of the Proceeds of Crime Act 2002.

[10.66] The judgment of Laws LJ carefully and extensively examines the issues of principle involved in what is essentially the criminal equivalent of a Mareva injunction. A helpful summary of the court's conclusions is found in Longmore LJ's judgment at [60]–[66]. As one would expect, in a case where dishonesty is charged the risk of dissipation will generally speak for itself. If over a long period there has been no asset dissipation, the prosecutor should explain why it is now feared at the date of the application. There is a duty upon applicants to make full disclosure. The circumstances that give rise to an apprehension that assets will be dissipated are equally likely to make it unwise to give a defendant advance notice that an application for a restraint order is being made.

Employment Law

I T SMITH, MA, LLB (CANTAB)

Barrister, Clifford Chance Professor of Employment Law, University of East Anglia

[11.1] In a year of considerable developments on the legislative front, the amount of case law reported in the general law reports has not been large. What there has been has been slanted towards discrimination law (including equal pay, which has taken on renewed significance recently) and/or EC law developments. In addition, questions of procedure have featured, with complications caused by the 2004 Employment Tribunal Rules coming into force and arguments being raised as to the possible effects of human rights legislation. Against this background, it is perhaps comforting to see cases still on standard areas of litigation such as unfair dismissal and the Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981/1794 (TUPE).

Sex discrimination and the burden of proof

[11.2] One facet of the modern legislation on discrimination has been the adoption over a period of time of the EC law-inspired statutory reversal of the burden of proof. The Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995 have all been amended to include it, and it was written in to the new regulations governing discrimination on the grounds of religion/belief and sexual orientation. Given these changes, it was obviously desirable that there would be an early decision at appellate level on the meaning of the new statutory provisions. This is what happened in *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] 3 All ER 812, which is of such importance that it is now in effect being used as a checklist by the employment tribunals.

[11.3] The appeal was in fact in relation to three conjoined cases. The *Igen* appeal (on a relatively straightforward allegation of race discrimination by disadvantageous treatment) was heard alongside that in *Emokpae v Chamberlin Solicitors* (dismissal because of rumours of an affair challenged as sex discrimination) and that in *Webster v Brunel University* (race discrimination alleged when the applicant heard a racist remark over the telephone which may or may not have been made by one of the respondent's employees). The principal issue in all of them was the extent of the onus on the applicant to establish 'facts from which the tribunal could, apart from this section, conclude in the absence of an adequate explanation' that the respondent has committed an

employment-related act of discrimination, in order to reverse the burden of proof on to the employer to prove that he did not commit the act. Going against one particularly noted dictum in the earlier case of *Nelson v Carillion Services Ltd* [2003] EWCA Civ 544, [2003] All ER (D) 253 (Apr), the Court of Appeal here held that these statutory provisions did not merely codify the pre-existing case law on the drawing of adverse inferences by tribunals, but took the law further (in a case of direct discrimination; *Nelson* concerned indirect discrimination where its actual decision is presumably still good law). In particular, there is now no discretion whether to find against the employer in the absence of a credible explanation; it is a requirement of the legislation. On the other hand, the court's emphasis on the importance of the first stage (proof of facts by the applicant) demonstrates that the statutory regime certainly does not reverse the burden merely on the making of an allegation of discrimination by the applicant. Moreover, the court echoes the view in *Bahl v Law Society* [2003] All ER (D) 570 (Jul) that unreasonable behaviour is not enough by itself, albeit that it may be a factor in assessing any explanation by the employer.

[11.4] The main thrust of the judgment, however, is to give approval at Court of Appeal level to the guidelines set out by the EAT under Judge Ansell in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] All ER (D) 61 (Apr) at [25], subject to certain clarifications. In particular, the court reaffirmed the original *Barton* guideline (10) that it is necessary for the employer to prove, on a balance of probabilities, that the treatment was 'in no sense whatsoever' on the grounds of sex; in *Emokpae* Judge McMullen had said that this was putting it too high and that it was enough to show that the treatment was 'not significantly influenced' by the prohibited ground, but this was held to be wrong. Helpfully, the Court of Appeal attach the 'revised *Barton* guidance' as an Annex at the end of their judgment, and it is to this that employment lawyers should now refer; it is also set out in a very helpful article by Thomas Linden and Garreth Wong at [2005] NLJ 400.

[11.5] The results in the appeals were that the employer's appeal in *Igen* was dismissed because the tribunal had gone through the correct stages (even though they had reached conclusions 'which other ETs may well not have reached'); the employee's appeal in *Emokpae* was dismissed because, although she might well have been unfairly dismissed (had she had a year's service), she had not been able to show a prima facie case of discrimination in order to throw the burden on to the employer; the employer's appeal in *Webster* was allowed because the applicant had not shown that an employee of the university had spoken the words she overheard, and the reference to 'could' in the statutory provision relates to facts from which discrimination 'could' be inferred, not that it 'could' have been the employer responsible.

Equal pay – comparator from a different employer?

[11.6] The question of cross-employer comparisons has been a live issue in equal pay law for some time now. UK law does not permit it, and although EC law may do so, the circumstances where this might happen have always been uncertain. It was this area that was revisited in *Allonby v Accrington & Rossendale College* Case C-256/01 [2005] All ER (EC) 577, though in fact with a couple of twists in the tail.

[11.7] For the purposes of the actual dispute between the applicant college lecturer and the principal respondents (the college that had employed her as a part-timer until 1996 when it was decided to subcontract the work, and the educational provider through which her services were then immediately re-offered to the college, on a self-employed basis), this reference to the ECJ was largely up-staged by the previous reference in *Lawrence v Regent Office Care Ltd* Case C-320/00 [2002] All ER (D) 84 (Sept). Once again, it was held that, although a cross-employer comparison is possible under art 141, that will only be in a case where the differences in pay can be attributed to a 'single source' (ie in practice where that source would have the power to put it right). That was not the case here because, although the employment with the college and the self-employment through the provider were contiguous (and there was an immediate decrease in pay with the latter), the college and the provider were sufficiently separate *not* to constitute a single source.

[11.8] The particular interest in the case may lie in the second and third main rulings. These arose because the applicant had also brought a claim against the Department of Education since she was no longer entitled to membership of the teachers' pension scheme owing to a statutory rule that it was only open to those under a contract of employment. The ECJ held that no such claim laid under a straightforward equal pay claim based on a man still in the college's employment. However, they went on to hold that the state legislation could be challenged on grounds of sex discrimination *if* the applicant could show a disproportionate effect on women of the 'contract of employment only' rule *and* the Department could not establish objective justification for it; in such an action, the applicant would not have to show an actual comparator, but could instead rely on statistics.

[11.9] There is, however, one other sub-ruling that gives food for thought (especially in a case such as this of ostensibly 'casual' self-employment after a contracting-out of sorts and the use of, in effect, agency workers). Given that the applicant had become self-employed, how could there be a challenge at all? Normally, EC law leaves employment status to the member state (hence, for example, the statutory coverage in the UK under EC directives of part-time *workers*, but fixed-term *employees*), but here a very different approach was taken. Article 141 applies to 'workers' and the ECJ held that, at least in this context, this is

to be given a *Community* meaning, ie a person who (for a certain period of time) performs services for and under the direction of another person for which they receive remuneration. This meaning will not cover independent providers of services who are not in a relationship of subordination with the person who receives the services. However, the (domestic) categorisation of 'self employed' will *not* determine this distinction; quite simply, some self-employed will be covered and some (the 'genuinely' self-employed, in DTI-speak) will not. On one level, this looks just like the domestic split between 'employee' and 'worker' *but* there is domestic authority that even to be a 'worker' there must be a necessary level of mutuality of obligations (see *Stephenson v Delphi Diesel Systems Ltd* [2003] All ER (D) 84 (Mar)); this Community test apparently does *not* look at mutuality (indeed, the ECJ states at para 72 that 'The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context ...'). Instead, it looks at an economic and factual 'subordination' test, which on these facts required consideration of 'the extent of any limitation on their freedom to choose their timetable, and the place and content of their work'. If all that had really changed (through the contracting out) was the legal regime under which she continued to provide much the same service, this approach strongly supports the applicant in a case such as this.

Maternity pay and backdated pay rises

[11.10] The ECJ have given judgment in *Alabaster v Woolwich plc* Case C-147/02 [2005] All ER (EC) 490, which in effect attacks the legislative change to the Statutory Maternity Pay (SMP) rules made in 1996 to comply with the ruling in *Gillespie v Northern Health and Social Services Board* Case C-342/93 [1996] All ER (EC) 284. This change permitted an employee taking maternity leave to count into the calculation for SMP purposes any pay increase awarded to employees such as herself after the commencement of the maternity leave, *provided* it was backdated to some point during the normal calculation period for SMP (the 'relevant period' under reg 21 of the Statutory Maternity Pay (General) Regulations 1986, SI 1986/1960, ie the eight weeks prior to the 14th week before the expected week of childbirth). *Alabaster* queried this restriction, in a case concerning a pay rise agreed just before maternity leave began but not backdated to the relevant period. One notable point about this reference was that the Advocate General advised finding against the employee (indeed, wanting to use the reference as an opportunity to rethink the whole *Gillespie* principle) but the court found in her favour. It ruled that an employee has a right to receive the benefit of any pay rise (through the calculation of SMP) which is awarded between the beginning of the reference period and the end of the maternity leave, whether or not it is backdated. This ruling goes beyond the facts of the case, to include pay rises taking effect after the commencement of the leave, though it must be

assumed that 'leave' here in the UK context means ordinary maternity leave (ie the period which is co-terminous with the period of SMP eligibility).

[11.11] This '*Alabaster* point' gave rise to a second change to the legislation. As from 6 April 2005, SI 2005/729 replaced reg 21(7) to state that:

'In any case where (a) a woman is awarded a pay increase (or would have been awarded such an increase had she not then been absent on statutory maternity leave, and (b) that pay increase applies to the whole or any part of the period between the beginning of the relevant period and the end of her period of statutory maternity leave), her normal weekly earnings shall be calculated as if such an increase applied in each week of the relevant period.'

Prior to April 2005, it is possible that there might be claims by others in Mrs Alabaster's position because her claim was under art 141 itself (not a directive) and so questions might arise as to direct effect in both the public and private sectors. The denouement of the actual *Alabaster* litigation came in May 2005, when Mrs Alabaster returned to the Court of Appeal armed with the ECJ decision and was awarded the actual pay in question – all £200-odd of it. There was some adverse comment in the press as to the ratio between the amount recovered and the cost of the litigation but, on the other hand (to cite the six words most likely to strike fear and despondency into the heart of an ACAS arbitrator such as the present author), it was a matter of principle.

TUPE and post-transfer changes

[11.12] The decision of the ECJ in *Delahaye v Ministre de la Fonction publique et de la Réforme administrative* Case C-425/02 [2005] All ER (EC) 575 (see also [12.68]–[12.72] below) might be yet another causing uncertainty in an area we thought reasonably settled in TUPE law. Its exact parameters are difficult to predict (rather like *Oy Liikenne Ab v Liskojärvi* Case C-172/99 [2001] All ER (EC) 544, a leading authority on acquired rights, or on the bus industry in Helsinki?).

[11.13] The issue was the well-aired one of whether a transferee can lawfully change terms and conditions of those transferred after the transfer. Relying on the old authority of *Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S* Case 324/86 [1988] ECR 739, the House of Lords held that any transfer-related change is void (*Wilson v St Helens BC* [1998] 4 All ER 609). Moreover, it is long established that merely wishing to rationalise terms and conditions with those of existing staff is not an 'ETO' reason under reg 8 of the domestic regulations (*Delabole Slate Ltd v Berriman* [1985] IRLR 305). Thus, domestic law has held, however inconveniently for the employer, that changes cannot be made unless there is a break in the chain of causation to the transfer, or a reorganisation going well beyond a simple rationalisation. It is this that *Delahaye* is difficult to square with.

[11.14] An employee of a vocational training organisation was transferred to the direct employment of the Luxembourg state on a transfer coming within the Acquired Rights Directive (EEC) 77/187. The problem that arose was that the terms of employment of state employees in such a post were fixed by law. Because of this she had to sign a new contract, going on to terms significantly worse than those she had had previously. She brought proceedings claiming that the state had to respect her previous terms (particularly as to pay, which had decreased by 37%). The court remitted the issue to the ECJ, which ruled that the state here was *not* obliged to do so. Without giving much by way of reasoning, the key passage is in paras 32 and 33:

‘Since [Directive 77/187] is intended to achieve only partial harmonisation in the field in question ... it does not preclude, in the event of a transfer of an activity to a legal person governed by public law, the application of national law which prescribes the termination of contracts of employment governed by private law. However, such a termination constitutes ... a substantial change in working conditions to the detriment of the employee resulting directly from the transfer, so that the transfer must, in such circumstances, be regarded as resulting from the action of the employer ... The same must apply where, as in the case at issue in the main proceedings, application of the national rules governing the position of state employees entails a reduction in the remuneration of the employees concerned by the transfer.’

[11.15] They did throw the employee one bone, which was that in deciding what pay state law mandated the employee must be able to count length of service with the transferor. Apart from that, however, the case does show a much laxer approach to post-termination changes than *Wilson v St Helens*, subject only to the employee being able to leave and claim what domestic law terms constructive dismissal. If they stay, they have to put up with the pay cut. Three particular uncertainties are worth mentioning.

[11.16] How widely might it apply? In its terms, it only applies to a transfer into (or back into) state employment; in such a case, what level of state wage fixing would be enough? Paragraph 32 talks of ‘public law’ but para 33 (which directly approaches the issue in question) talks of ‘national rules’ governing terms and conditions. Would a state body transferee be able to rely on its own (lower) pay rates as determined by collective bargaining? If not, and ‘rules’ means ‘law’, this case would hardly ever apply in the UK and is best tactfully forgotten.

[11.17] On the basis that Directive 77/187 is not meant to achieve full harmonisation, presumably UK law can give employees *more* protection than EC law. In that case, could it be argued that *Wilson* trumps this case, even in public sector employment? It is all well and good to say that ultimately the employee could leave and claim constructive dismissal, but in the context of UK domestic law would that dismissal be *unfair*? A constructive dismissal is *not* automatically unfair, the two issues being separate. If the matter was reasonably handled (so that there was no

procedural unfairness) would the pay cut itself be enough to make it unfair, if the ECJ has said that EC law considers it lawful?

Constructive unfair dismissal and the last straw doctrine

[11.18] The decision of the Court of Appeal in *Omilaju v Waltham Forest London BC* [2004] EWCA Civ 1493, [2005] 1 All ER 75 was to overturn the decision of the EAT, but on the application of the relevant principles to the facts, not on the correctness of those principles themselves. The case is of note largely for the proposition that in a 'last straw' constructive dismissal case the incident argued to be that last straw does not in itself have to be a breach of contract (applying *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, EAT). In the case itself there were allegations of a series of breaches by the employer (tied in with multiple proceedings against the employer for discrimination) but the incident in respect of which the employee left was the refusal by the employer to pay full salary for time spent attending the tribunal for the discrimination proceedings.

[11.19] The tribunal found that this was not enough for constructive dismissal. Applying the above principle, the EAT ([2004] 3 All ER 129) allowed the employee's appeal. However, the Court of Appeal restored the tribunal's decision. They agreed with the principle that the last straw need not itself be a contractual breach *but* added the rider that the last straw must contribute, however slightly, to the sustained breach of trust and respect. If it was not capable of doing so, that was the end of the matter; moreover, an entirely innocuous act by the employer cannot be the last straw, even if the employee genuinely but mistakenly interprets it in that light. In the instant case, the tribunal had properly considered all the facts and were entitled to find that, objectively, this (contractually proper) refusal to pay for time not worked was not capable of being the final straw

Unfair dismissal compensation

[11.20] The judgment of the EAT under Burton P in *Morgans v Alpha Plus Security Ltd* [2005] 4 All ER 655 is of interest on two levels. On its facts it concerned a specific point on the receipt of benefits by a dismissed employee, but it also raised a wider issue of mitigation which had recently been considered by the EAT under a different judge in *Stowe v Voith Turbo Ltd* [2005] All ER (D) 152 (Jan), to very different effect. The question at issue is one of potential significance as to both principle and amount to be awarded. What is the position if the unfairly dismissed employee was not given full (or any) contractual notice, but during what should have been the notice period he or she obtains new work? Should the earnings from that new work be set off against loss during the notice period? On ordinary principles of mitigation, of course, they should. However, it was accepted for many years that a more generous (if illogical) approach should be taken, of *not* deducting them. This was

always explained on the ground of 'good IR practice' (a phrase to bring sentimental tears to the eyes of employment lawyers of a certain age, along with 'the Ovaltinies', 'In the Summer Time' and 'Old Labour'). In other words, the notice period payment was sacrosanct; after all, if the employer had dismissed with wages in lieu and then the ex-employee had found another job in the notice period, no employer would have dreamed of trying to claw back any of the termination payment already made.

[11.21] This orthodoxy was revisited and overturned by Burton P in the EAT in *Hardy v Polk (Leeds) Ltd* [2004] All ER (D) 282 (Mar), where it was held that in the light of more modern case law there should now be *no* such exception to the normal rules of mitigation, and so earnings in the missing notice period should be deducted. When, however, this issue arose before the EAT under Judge McMullen in *Voith Turbo* they took a very different view. Confronting *Hardy v Polk* directly, they declined to follow it, arguing that 'good IR practice' is as important now as in the 1970s (the report does not state whether the judge was wearing flares) and that the older authorities on not deducting the earnings (*Norton Tool Co Ltd v Tewson* [1973] 1 All ER 183, as approved in *Babcock FATA Ltd v Addison* [1987] 2 All ER 784) remain authoritative. However, the Empire struck back in double quick time in *Morgans*. Approaching the issue from a different angle, Burton P strongly refuted the criticisms in *Voith Turbo* and reaffirmed the correctness of *Hardy v Polk* (at [18]):

'The main point that we were seeking to make in *Hardy* and which formed the fundamental basis for our conclusion, is that where, whether by virtue of the consequences of the duty to mitigate or as a result of actual receipts by an applicant, resulting from mitigation or otherwise, no – or a reduced – economic loss is suffered, then the compensation under s 123 must similarly be so reduced.'

The weight of authority, especially presidential, must now be considered to be in favour of deduction, but a Court of Appeal decision would now be decidedly handy.

[11.22] In fact, *Morgans* concerned a slightly different point on which it hopefully settles a longstanding disagreement in the authorities. The unfairly dismissed employee had suffered medical problems, been certified unfit for work by his doctor, and had received incapacity benefit totalling £2,780. Was this to be deducted from the compensation awarded by the tribunal for the period including that in which he was in receipt of the benefit? The problem here arises because incapacity benefit is not a recoupable benefit under the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996, SI 1996/2349. The question whether to deduct it from the compensatory award has split the EAT three ways. In *Hilton Hotels (UK) Ltd v Faraji* [1994] IRLR 267 the EAT under Judge Hargrove held that it should not be deducted at all. In *Puglia v James & Sons* [1996] IRLR 70 the EAT under Mummery J held that it should be deducted in full. In *Rubenstein v*

McGloughlin [1996] IRLR 557 the EAT under Judge Hicks sought a *via media* of deducting half (redolent of the position generally in personal injury claims between 1948 and 1989). In *Morgans Burton P* expressly resolved the issue by applying the strongly mitigation-based approach above, approving *Puglia* and disapproving *Rubenstein* and *Faraji*, and holding that the benefit was to be deducted.

Procedure and human rights

[11.23] What is the effect of a serious delay by a tribunal between hearing a case and issuing its decision? Is it a ground of appeal? In *Bangs v Connex South Eastern Ltd* [2005] EWCA Civ 14, [2005] 2 All ER 316 the decision went in favour of the employee but there was a significant delay. The employers, who argued that the delay meant that the tribunal had failed to deal with some of the points made, appealed and the EAT allowed their appeal, appearing to consider that the delay was *itself* a ground of appeal, especially against the background of art 6.1 of the ECHR.

[11.24] The Court of Appeal allowed the employee's appeal. Mummery LJ, giving the lead judgment, said that, although the human rights cases established that delay in the civil courts is an independent ground of appeal, that approach should *not* be transposed into the employment area because of the complication that appeal from a tribunal is restricted to points of law. That meant that delay, which is a question of fact, cannot in itself be appealable (even if in other contexts it might arguably breach art 6). This in turn meant that in a delay case it remained necessary to show that, as a result of the delay, the decision itself was perverse. The only way to alter that position would be to hold that the restriction of appeals to points of law itself breached the Convention and this, not surprisingly, the court declined to do. Mummery LJ did add that it might also be possible to argue that the delay meant that there was sufficient of a procedural irregularity as to amount to an error of law (the other major ground for appeal), but qualified this by saying that it would only arise in exceptional cases. Thus, perversity remains the key, and it is the *decision* that must be considered, not the delay per se. On the facts, the court held that, in spite of the employer's concerns about the decision, taken as a whole the decision did not demonstrate a real risk that the defendant was deprived of the benefit of a full and fair trial. Thus, the decision stood.

Procedure – electronic documents

[11.25] There is considerable emphasis in the modern procedure rules for tribunals on precise time limits for the various stages, starting with the employee lodging the complaint and the employer responding to it. However, the background to all of this is of course the revolution in

electronic communications seen in recent years. In one particular aspect, this problem led the EAT to suggest one solution, only to disapprove it shortly afterwards.

[11.26] In *Clark v Midland Packaging Ltd* [2005] 2 All ER 266 the time limit for the employer's response to the claimant's unfair dismissal action expired at 4 pm on 4 August 2004. The employer sent the necessary documents that afternoon by fax. The sending fax machine showed the transmission (of 21 pages) ending at 4.09. The EAT Registrar rejected the employer's notice, as being out of time. The employer appealed on the basis that on this timing at least some of the fax must have commenced transmission before the deadline. The EAT under Burton P agreed and allowed the case to proceed on the basis that, in either physical or electronic format, a document whose dispatch has started before the deadline counts as good service.

[11.27] It then transpired, however, that the decision in *Clark* was based on lack of knowledge by the EAT of one essential fact, namely that the EAT administration operates a log of electronic communications showing commencement time *and duration*. On that basis, when the matter arose before Burton P again in *Woodward v Abbey National plc* [2005] 4 All ER 1346 he took the opportunity to reconsider and held that *Clark* was wrong; the correct rule is that precise compliance with the whole document(s) is required (the existence of the log showing that this is possible). This ruling was said to be applicable also to email and to delivery by post and by hand. However, in the case of the former a further complication arose.

[11.28] How is electronic presentation meant to work? In *Smith v Tyne and Wear Autistic Society* [2005] 4 All ER 1336 an employee was required to present his complaint by 23 February 2004. On 20 February he sought to use the ETS facility for electronic presentation. He filled in the online application form and submitted it. The message in return said that receipt would be confirmed by the ET office; it asked him to telephone the office if this did not happen within one working day. He did not receive confirmation, nor did he telephone to query this. In reply to his eventual contact with the office on 8 March, he was told that there was no trace of his application. He immediately sent another application, out of time. It transpired that the online facility is not operated by the ETS, but by a commercial email service which ought to forward the application to the ETS.

[11.29] The tribunal held that it was enough that the application is received by that email service (even if not properly forwarded) and so held that the application was presented in time. The EAT agreed. Good service is affected by submitting the claim online to the ETS's website. Once this had happened, the claim is in time and this is not affected by any subsequent difficulty or delay in forwarding it to the ETS itself. The

exhortation to check to see if this has happened is merely advisory; the public are entitled to assume that acceptance by the website is sufficient.

European Union Law

CATHERINE BARNARD, MA, LL.M
Trinity College, Cambridge

[12.1] This year has not proved as eventful as some, but nevertheless the court has developed the doctrine of incidental direct effects, decided some important cases on free movement of capital and Union citizenship and has probably ended up costing national treasuries some substantial sums of money.

Direct effect

[12.2] It is a well-established principle that clear and sufficiently precise provisions of unimplemented or incorrectly implemented Directives have vertical (but not horizontal) direct effect: see eg *Marshall v Southampton and South-West Area Health Authority (Teaching)* Case 152/84 [1986] 2 All ER 584, para 48; *Faccini Dori v Recreb Srl* Case C-91/92 [1995] All ER (EC) 1, paras 22–25. However, a number of cases involving so-called ‘triangular’ situations have cast doubt on this rule: see M Dougan ‘The “Disguised” Vertical Direct Effect of Directives?’ (2000) 59 CLJ 586; K Lackhoff and H Nyseens ‘Direct Effect of Directives in Triangular Situations’ (1998) 23 ELRev 397. For example, *CIA Security International SA v Signalson* Case C-194/94 [1996] All ER (EC) 557 concerned the failure by the Belgian government to notify its law on security systems to the Commission under art 8 of Directive 98/34. This had an effect on private litigation involving two rival companies, CIA Security and Signalson, where Signalson tried to prevent CIA from marketing an alarm system which had not been approved under Belgian law. CIA successfully argued that the Belgian rules did not apply because they had not been notified to the Commission under art 8. The court agreed, and said that a breach of the obligation to notify constituted a *substantial procedural defect* such as to render the technical regulations in question inapplicable to individuals. Therefore, CIA could rely on art 8 against Signalson and raise the Belgian government’s failure to notify as a defence to the counterclaim.

[12.3] This ruling seemed to suggest that CIA could rely on the provisions of Directive 98/34 horizontally. Although the court did not address this issue directly it is unlikely that it intended to overturn the no horizontal direct effect rule – a rule of such constitutional significance – covertly. If so, how can *CIA* be explained? One possibility is that CIA was not relying on art 8 of the Directive aggressively (as a sword) but defensively (as a shield). In other words, art 8 was not imposing any legal

obligation on Signalson; Signalson was merely suffering a disadvantage (that it could not rely on national law which would have helped it push CIA's alarm system off the market). Another view is that the Belgian law was a quasi-regulatory power, enabling individuals to take court action to secure the withdrawal from the market of a product not in conformity with the Belgian law. In many states this type of power would have been exercised by a public body. To that extent Signalson was acting as an (unwitting) agent of the state: the form of the action was horizontal but the substance was vertical. For this reason Signalson could not take advantage of the state's failure for its own purposes.

[12.4] These explanations help us to understand *R (on the application of Wells) v Secretary of State for Transport, Local Government and the Regions* Case C-201/02 [2005] All ER (EC) 323, a case which was decided not under the Notification Directive 98/34 but the Environmental Impact Assessment (EIA) Directive 85/337. The case concerned a plan to reopen a quarry in an area recognised as being environmentally sensitive. However, at no time had an environmental impact assessment been carried out. Wells, a local resident asked the Secretary of State to revoke or modify the planning permission pending an EIA, but he refused. One of the questions raised was whether Wells could rely on the EIA Directive. The court referred to the *Marshall* line of case law and added that 'an individual may not rely on a Directive against a member state where it is a matter of a state obligation directly linked to the performance of another obligation falling, pursuant to that Directive, on a third party'. In other words, a Directive cannot be used as a sword to impose obligations on a third party. However, the court continued, 'mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a Directive against the member state concerned'. So, following cases like *CIA*, a Directive can be used as a shield, which may well result in the third party suffering adverse repercussions. As the court explained, the obligation on the member state to ensure that the competent authorities carry out an assessment of the environmental effects of the working of the quarry was not directly linked to the performance of any obligation which would fall on the quarry owners pursuant to Directive 85/337. The fact that mining operations had to be halted to await the results of the assessment was the consequence of the belated performance of the state's obligations. However, such a consequence could not be described as inverse direct effect of the provisions of the Directive in relation to the quarry owners. Thus, the private party, the quarry owners, suffered a disadvantage (or 'adverse repercussions' as the court called it); they were not subject to an additional obligation. Thus, the rule concerning no horizontal direct effect of Directives remains in tact.

Remedies

[12.5] In *Amministrazione delle Finanze dello Stato v SpA San Giorgio*: 199/82 Case 199/82 [1983] ECR 3595 the court ruled that a *restitutionary* claim was available to a trader who had paid a customs duty or a charge having equivalent effect contrary to Community law. The court said that this was a consequence of, and an adjunct to, the rights conferred on individuals by the Community provisions prohibiting such charges. However, the court said that there would be no restitutionary claim if it led to the trader being unjustly enriched, as a result of having passed the cost on to others. As the court explained in *Societe Comateb v Directeur General des Douanes et Droits Indirects and related references* Joined Cases C-192/95–218/95 [1997] STC 1006, to repay the trader the amount of the charge already received from the purchaser would be tantamount to paying him twice over whilst in no way remedying the consequences for the purchaser of the illegality of the charge. The court continued that it was for the national courts to determine whether the burden of the charge had been transferred by the trader to others in whole or in part and, if so, whether reimbursement to the trader would amount to unjust enrichment. If the burden of the charge had been passed on only in part, it was for the national authorities to repay the trader the amount which had not been passed on.

[12.6] In *Comateb* the court developed its ruling in *San Giorgio* and said that if the charge has been passed on to the final consumer, he or she can obtain reimbursement either from the trader or the state. If reimbursement is obtained from the trader, the trader must in turn be able to obtain reimbursement from the national authorities. If, on the other hand, the final consumer can obtain repayment directly from the national authorities the question of reimbursing the trader does not arise.

[12.7] The likelihood of the final consumer actually reclaiming the money is minimal. They are more likely to vote with their wallets and buy the rival product which is not subject to these additional costs. For this reason, the court added in *Comateb* that the trader could also have a claim for damages for loss of sales brought about by having to pass on the unlawfully levied charge. If domestic law permits the trader to plead such damage, the national court must give effect to such a claim. If, on the other hand, national law does not provide such a remedy, then the state will still be liable for reparation of loss caused by the levying of charges not due, irrespective of whether those charges have been passed on, in accordance with the principles laid down in *Brasserie du Pêcheur SA v German*; *R v Secretary of State for Transport, ex p Factortame* Joined Cases C-46/93 and C-48/93 [1996] All ER (EC) 301.

[12.8] The principle of national procedural autonomy applies to these claims for restitution and damages. So national procedural rules govern the cause of action provided that they are not less favourable than those relating to similar claims regarding national charges (the principle of

non-discrimination) and are not framed so as to render virtually impossible the exercise of rights conferred by Community law (the principle of effectiveness). National time limits will also apply to these claims provided they are reasonable and do not breach the principles of equivalence and effectiveness.

[12.9] These well-established principles were considered in *Weber's Wine World Handels-GmbH v Abgabenberufungskommission Wien* Case C-147/01 [2005] All ER (EC) 224 and *Evans v Secretary of State for the Environment, Transport and the Regions* Case C-63/01 [2005] All ER (EC) 763. *Weber's Wine World* followed on from a dispute which had previously been considered by the ECJ in *Evangelischer Krankenhausverein Wien v Abgabenberufungskommission Wien* Case C-437/97 [2001] All ER (EC) 735, where the court had ruled that Community law prohibited a duty levied in Austria on certain drinks. However, recognising the potential financial impact of this ruling, the ECJ had imposed temporal limitations on its ruling. Nevertheless, shortly before the *EKW* judgment was delivered, but after the Advocate General's Opinion which had indicated that the national rule breached Community law, the national tax code was amended so that duty levied but not due could not be repaid or set off where its economic burden had been passed on to third parties. It was this amendment which was challenged in *Weber's Wine World*.

[12.10] The ECJ reiterated its ruling in *Comateb* and confirmed that member states could resist repayment to a trader of a charge levied but not due where the charge had been passed on to a third party. However, the court said that:

'As that exception is a restriction on a subjective right derived from the Community legal order, it must be interpreted restrictively, taking account in particular of the fact that passing on a charge to the consumer does not necessarily neutralise the economic effects of the tax on the taxable person.'

Thus, the court required to be established the degree of unjust enrichment that repayment of the charge would entail for the trader.

[12.11] The court also reiterated the requirement that the conditions of national procedural rules under which a claim for repayment were made had to satisfy the principles of equivalence and effectiveness. In respect of the latter principle, the court suggested that the presumption that the charge had been passed on did infringe the principle of effectiveness.

[12.12] *Evans* also raised question about the effectiveness of remedies. The case concerned the British implementation of Directive 84/5 which requires states to set up a body to pay compensation to victims of accidents caused by uninsured or untraced drivers. In the UK the Motor Insurers' Bureau performs this task. It awards compensation on the same basis as the courts but has no power to order interest to be paid. Unsurprisingly, following *Marshall v Southampton and South West Hampshire Area Health Authority (No 2)* Case C-271/92 [1993] 4 All ER

586, the court ruled that compensation payable under the Directive had to take account of the 'effluxion of time until actual payment of the sums awarded in order to guarantee adequate compensation for the victims'. The court also said that the complainant did in principle have the right to bring an action for damages for the incorrect transposition of the Directive and reiterated that the *Factortame* conditions applied to any such action. The court said it was for the national court to decide whether the conditions laid down in that case had been satisfied.

Free movement of goods

The interplay between articles 25, 90 and 28 EC

[12.13] According to the theory, arts 90 and 25 are mutually exclusive (art 25 applies to charges levied at the frontier, while art 90 applies to charges levied within the member state – *Nygård v Svineavgiftsfonden* Case C-234/99 [2002] All ER (D) 331 (Apr), para 17). Articles 90 and 28 are also mutually exclusive (art 90 concerns fiscal measures, art 28 non-fiscal – *Compagnie commerciale de L'Ouest v Receveur principal des douanes de La Pallice-Port* Joined Cases C-78/90 to C-83/90 [1992] ECR I-1847, para 20). However, this division is not always so straightforward, as *EC Commission v Denmark* Case C-47/88 [1990] ECR I-4509 demonstrated. Under Danish law the rates of duty applicable to private vehicles, calculated by reference to the value of the vehicle, were 105% on the first DKR 20,000 and 180% on the balance. The court said that although art 90 did not provide a basis for censuring the excessiveness of the level of taxation, charges of such an amount might impede the free movement of goods contrary to art 28. However, when, in *De Danske Bilimportører v Skatteministeriet, Told- og Skattestyrelsen* Case C-383/01 [2005] All ER (EC) 553, a professional association of car importers relied on *Commission v Denmark* to challenge the level of duty applied to cars imported into Denmark, the court, having looked at the figures (from 1985 to 2000 the total number of registered vehicles in Denmark rose from 1.5 million to 1.854 million and the number of new registrations varied between 78,000 and 169,000 per year), found that free movement of vehicles was not in fact impeded.

[12.14] The court also considered the charge in *Bilimportører* to be compatible with art 90. It noted that the fact that a charge of that sort was in fact imposed solely on imported new vehicles, because there was no domestic production, was not such as to cause it to be characterised as a charge having equivalent effect, for the purposes of art 25 EC, rather than internal taxation, within the meaning of art 90 EC, since it was part of a general system of internal dues applied systematically to categories of vehicles in accordance with objective criteria irrespective of the origin of the products. And because there was no evidence of discrimination or protection, the tax did not breach art 90.

Establishing a breach of article 28 EC

[12.15] It has long been established that national measures which impose greater costs on imported products than on domestically produced goods breach art 28 unless they can be justified by reference to one of the mandatory requirements (*Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* ('*Cassis de Dijon*') Case 120/78 [1979] ECR 649). However, since the court decided in *Keck and Mithouard* Joined Cases C-267/91 and C-268/91 [1993] ECR I-6097 that non-discriminatory certain selling arrangements do not breach art 28 at all, states have regularly argued that their rules fall within the scope of *Keck* and are therefore per se legal. This approach can be seen in *Radlberger Getränkegesellschaft mbH & Co v Land Baden Württemberg* Case C-309/02 [2005] All ER (EC) 1001. The case concerned the replacement of a global packaging waste collection system with a deposit and return system. The court said that, contrary to the submissions of the defendant and the German government, the national rules could not be treated as national provisions restricting or prohibiting certain selling arrangements within the meaning of *Keck*. The court said that the national rules required the packaging or the labelling of imported products to be altered and so prevented those measures from concerning selling arrangements for the products within the meaning of *Keck*. For good measure, the court added that, given that the provisions of the national law did not affect the marketing of drinks produced in Germany and drinks from other member states in the same manner, they could not fall outside the scope of art 28. The measure was therefore classified as a measure having equivalent effect to a quantitative restriction 'even though the hindrance is slight and even though it is possible for the products to be marketed in other ways'.

[12.16] The question was then whether the national rules could be justified on environmental grounds. Following *EC Commission v Denmark* Case 302/86 [1988] ECR 4607, the court accepted environmental protection as a justification. It noted that the obligation to establish a deposit and return system for empty packaging was an indispensable element of a system intended to ensure that packaging was reused: it was liable to increase the proportion of empty packaging returned and resulted in more precise sorting of packaging waste, thus helping to improve its recovery. In addition, the charging of a deposit contributed to the reduction of waste in the natural environment, since it encouraged consumers to return empty packaging to the points of sale. However, the court thought the national rules were disproportionate due to the absence of transitional arrangements. It said the national rules had to allow the producers and distributors time to adapt their production methods and the management of non-reusable packaging waste to the requirements of the new system. It continued that the national legislation, which was 'certainly advantageous from an ecological point of view', complied with the principle of proportionality only if, while encouraging the reuse of packaging, it gave the producers and distributors concerned a reasonable

transitional period to adapt to it and ensured that, at the time when the packaging-waste management system changed, every producer or distributor concerned could actually participate in an operational system.

The express derogations

[12.17] Article 30 EC provides a number of express derogations from the principle of free movement of goods. The most frequently invoked derogation concerns health – of humans, animals and plants. This derogation is scrutinised particularly carefully by the court, not least because it has been invoked by member states in the past to disguise broadly protectionist policies (see eg *EC Commission v United Kingdom* Case 40/82 [1982] ECR 2793 (Newcastle disease)). However, the court has recognised that member states do enjoy some margin of discretion as to what constitutes the health needs of their own states, especially when the scientific evidence about the health risks is disputed. This was the issue in *Officier van Justitie v Sandoz BV* Case 174/82 [1983] ECR 2445. In that case Sandoz wanted to import muesli bars into the Netherlands to which vitamins had been added. These bars were sold in Belgium and Germany but the Dutch authorities refused to grant authorisation on public health grounds. The court said that, in so far as there were uncertainties at the present state of scientific research, it was for the member states, in the absence of harmonisation, to decide what degree of health and life of humans they intended to assure, having regard to the requirements of the free movement of goods within the Community. Therefore, in view of the uncertainties inherent in the research, national rules prohibiting, without prior authorisation, the marketing of foodstuffs to which vitamins had been added were justified within the meaning of art 30, provided that the member state's power was restricted to what was necessary to attain the legitimate aim of protecting health.

[12.18] In more recent years, the court has justified its approach in *Sandoz* on the basis of the precautionary principle. This allows member states to take protective measures without having to wait until the existence and the gravity of those risks are fully demonstrated (*R v Ministry of Agriculture, Fisheries and Food, ex p NFU* Case C-157/96 [1998] ECR I-2211, para 63) although, as the court pointed out in *Monsanto Agricoltura Italia SpA v Perzidenza del Consiglio dei Ministri* Case C-236/01 [2003] All ER (D) 95 (Sep), para 106, the risk assessment cannot be based on purely hypothetical considerations. The court allowed Denmark to rely on the precautionary principle in *European Commission v Denmark* Case C-192/01 [2003] All ER (D) 148 (Sep), a decision which was relied on in turn by France in *European Commission v France* Case C-24/00 [2004] All ER (D) 81 (Feb) and *Criminal Proceedings against Greenham* Case C-95/01 [2005] All ER (EC) 903, both decided on the same day, to defend itself against accusations of interference with free movement of goods.

[12.19] Greenham was prosecuted for selling meal replacement food supplements (Juice Plus + vegetable mixture and Juice plus + fruit mixture) which had been imported from other member states where they had been lawfully manufactured and/or marketed. The substance coenzyme Q10 had been added to these products, a nutrient whose addition was not authorised in France for human consumption (although it had been authorised in a number of other member states), and vitamins in quantities exceeding that of the recommended daily intake. The court said that the French requirements breached art 28 but could be justified under art 30 provided the following conditions were satisfied:

- The national rules had to make provision for a procedure enabling economic operators to have a nutrient included on the national list of authorised substances. The procedure had to be readily accessible and completed within a reasonable time. If the application was turned down, this decision had to be open to challenge before the courts.
- An application to obtain the inclusion of a nutrient on the national list of authorised substances could be refused by the competent national authorities only if such substance posed a genuine risk to public health following a detailed assessment of the risk to public health, using the most reliable scientific data available and the most recent results of international research. The state also had to show that the steps taken were proportionate.

[12.20] The court then considered in some detail how the risk assessment should be carried out. It said that a prohibition on the marketing of foodstuffs – the most restrictive obstacle to trade in products lawfully manufactured and marketed in other member states – had to be based on a detailed assessment of the risk alleged by the member state invoking art 30 EC. The object of the risk assessment was to appraise the degree of probability of harmful effects on human health from the addition of certain nutrients to foodstuffs and the seriousness of those potential effects. The court then added that where a risk assessment revealed that scientific uncertainty persisted as regards the existence or extent of real risks to human health, member states could, in accordance with the precautionary principle, take protective measures without having to wait until the existence and gravity of those risks were fully demonstrated. However, the risk assessment could not be based on purely hypothetical considerations.

[12.21] So what evidence had the French government relied on? The importers were told that the French public health authority was not in favour of the addition of coenzyme Q10 to human food, following an application by another economic operator for authorisation to place on the market, on the grounds of (1) the absence of nutritional need as regards the addition of coenzyme Q10; (2) the lack of toxicological data on the effects of that substance; and (3) there was no reason to authorise the marketing of a foodstuff which substances had been added to, which,

even if at present they posed no danger to public health, were nonetheless capable of giving rise to such a risk in future, especially as such substances bestowed no nutritional benefit.

[12.22] The court did not seem impressed by this reasoning. It said that while the criterion of the nutritional need of the population of a member state could play a role in its detailed assessment of the risk which the addition of nutrients to foodstuffs could pose for public health, the absence of such a need could not, by itself, justify a total prohibition, on the basis of art 30 EC, on marketing foodstuffs lawfully manufactured and/or marketed in other member states. The court also indicated that the scientific evidence produced was insufficient, although this was ultimately for the national court to decide. However, it did add that:

‘Where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures.’

Free movement of services

The basic principles

[12.23] In recent years, some of the court’s most interesting cases have arisen in the context of free movement of services. While it was originally thought that the Treaty provisions on persons (arts 39, 43 and 49) prohibited discrimination on the grounds of nationality, the services case *Säger v Dennemeyer & Co Ltd* Case C-76/90 [1991] ECR I-4221 made clear that not only did the Treaty prohibit discrimination on the grounds of nationality but it also prohibited measures which impeded market access. As the court said, art 49 required:

‘... *not only* the elimination of all discrimination against a person providing services on the ground of his nationality *but also* the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when *it is liable to prohibit or otherwise impede* the activities of a provider of services established in another Member State where he lawfully provides similar services.’

[12.24] The court continued that any such restriction could only be justified by imperative reasons relating to the public interest. This approach has been followed in numerous cases including *European Commission v France* Case C-262/02 [2005] All ER (EC) 157 and *Bacardi France SAS v Télévision Française 1 SA* Case C-429/02 [2005] All ER (EC) 157. Both cases concerned French law (*loi Evin*) which prohibited television advertising for alcoholic drinks, whether direct or indirect. The law did, however, permit alcohol to be advertised in the press, on radio and on billboards. The law was supplemented by a Code of Conduct which distinguished between bi-national events (whose retransmission was

specifically aimed at a French audience) and multinational events (which were retransmitted in a number of countries and so were not regarded as being aimed at the French public). In respect of bi-national (but not multinational) sports events taking place abroad, French broadcasters had to use all available means to prevent the appearance on their channels of brand names of alcoholic drinks. This included using all technical means to avoid showing any such adverts. In the first case, the Commission brought art 226 enforcement proceedings against France alleging that the French rules prohibiting television advertising for alcoholic drinks were contrary to art 49, as were the rules prohibiting indirect television advertising resulting from the appearance on screen of hoarding visible during the retransmission of bi-national sporting events held in other member states. The second case resulted from an art 234 reference from a French court in the course of proceedings brought by Bacardi against the French broadcasters, which alleged that by putting pressure on foreign clubs to refuse to allow Bacardi's brand name to appear on advertising hoardings, the French broadcasters were in breach of art 49.

[12.25] In both cases the court applied the *Säger* principle and agreed that the rules breached art 49 because: (1) the owners of the advertising hoardings had to refuse, as a preventive measure, any advertising for alcoholic beverages if the sporting event was likely to be retransmitted in France; (2) they impeded the provision of broadcasting services for television programmes because French broadcasters had to refuse all retransmission of sporting events in which hoardings bearing advertising for alcoholic drinks marketed in France might be visible; and (3) the organisers of sporting events taking place outside France could not sell the retransmission rights to French broadcasters if the retransmission of the television programmes was likely to contain indirect television advertising for those drinks.

[12.26] However, the court then considered whether the French rules could be justified on public health grounds. It noted that 'Measures restricting the advertising of alcoholic beverages in order to combat alcohol abuse reflect public health concerns' and that the rules were proportionate. Relying heavily on Advocate General Tizzano's opinion, the court adopted a fairly light touch towards the review of the proportionality of the French restriction. For example, in respect of the argument that the French rules on television advertising were inconsistent, since they applied only to alcoholic beverages whose alcohol content exceeded 1.2°, concerned only television advertising, and did not apply to advertising for tobacco, the court contented itself with the observation that the 'option lies within the discretion of the member states to decide on the degree of protection which they wish to afford to public health and on the way on which that protection is to be achieved'.

Healthcare services

[12.27] One of the most controversial areas in which free movement of services has been raised is in respect of the healthcare sector. For many years it had been thought that public healthcare was exempt from the application of art 49 because the public provision of healthcare was not an economic activity. Furthermore, healthcare has traditionally been provided on a territorial basis: patients contribute to a national system either through taxation or by paying premiums into an insurance scheme. In return, healthcare is available from a locally based provider. Community rules on free movement would interfere with this delicate balance. However, what is the situation if the treatment is not available locally or the individual is placed on a long waiting list prior to getting treatment? Can they rely on art 49 to travel to another member state to receive the treatment and have the costs of that treatment reimbursed by their own healthcare systems? In *Kohll v Union des Caisses de Maladie* Case C-158/96 [1996] All ER (EC) 673 the court suggested that the answer might be yes. The case concerned Luxembourg insurance rules permitting treatment to be received in other member states but requiring prior authorisation from the sickness fund which was meeting the cost. No requirement for prior authorisation was imposed in respect of treatment received domestically. When Kohll's daughter was refused permission to receive orthodontic treatment in Germany he argued that the Luxembourg rules breached art 49. In principle the court agreed, arguing that because the rules had the effect of making the provision of services between member states more difficult than the provision of services purely within one member state they breached art 49 unless they could be justified.

[12.28] Thus, in *Kohll* the court suggested that in respect of non-hospital (extramural) care a prior authorisation requirement could not be justified, with the result that patients (as opposed to the healthcare service or sickness funds) could demand treatment in other member states and be reimbursed for the costs of that treatment. However, *Kohll* left open two questions: first, whether the same rules applied to hospital (intramural) healthcare and, secondly, whether the principle laid down in *Kohll* applied to a system based on benefits in kind rather than on reimbursement. These questions were considered by *Geraets-Smits v Stichting Ziekenfonds VGZ*, *Peerbooms v Stichting CZ Groep Zorgverzekeringen* Case C-157/99 [2003] All ER (EC) 481 and *Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen; van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* Case C-385/99 [2005] All ER (EC) 62.

[12.29] Both cases concerned the Dutch healthcare system, which is funded through a sickness insurance scheme. Unlike the Luxembourg scheme, which provides a right for the insured to be reimbursed for medical bills paid to providers, the Dutch scheme provides benefits in

kind. This means that the sickness funds enter into agreements with (local) healthcare providers (usually hospitals in the Netherlands) and the insured patient must go to one of the contracted providers for treatment. Unlike the Luxembourg system, the patient does not pay and then get reimbursed. Instead, the contracted providers are paid directly by the sickness funds.

[12.30] While the basic rule is that patients receive treatment from contracted providers, the Dutch sickness funds do authorise treatment from non-contracted providers (both at home and abroad) on two conditions: first, that the treatment is 'normal in the professional circles concerned' and, secondly, that the treatment by the non-contractual provider is necessary for the patient after first assessing the treatment available in the Netherlands and whether it could be obtained without undue delay. The compatibility of these conditions was at issue in *Geraets-Smits and Peerbooms* and *Müller-Fauré and van Riet*. *Geraets-Smits and Peerbooms* largely concerned the question of the availability of the treatment, and *Müller-Fauré and van Riet*, undue delay.

[12.31] Mrs Geraets-Smits, a Dutch national suffering from Parkinson's disease, sought reimbursement for the costs of her medical treatment in Germany, which she claimed was better than that provided in the Netherlands. Mr Peerbooms, a Dutch national in a persistent vegetative state, was transferred to Austria for neurostimulation treatment. He could not have obtained this treatment in the Netherlands, where the technique was used only experimentally. In both cases reimbursement was refused on the grounds that satisfactory and adequate treatment was available in the Netherlands.

[12.32] The court found that the prior authorisation rules laid down by the insurance schemes for treatment by non-contracted providers 'deter, or even prevent, insured persons from applying to providers of medical services established in another member state and constitute, both for insured persons and service providers, a barrier to freedom to provide services'. In principle the rules therefore breached art 49.

[12.33] The court then considered the justifications for the authorisation requirement. It noted that the Dutch system was planned to ensure sufficient and permanent access to a balanced range of high-quality hospital treatment (ie by establishing and equipping an appropriate number of hospitals evenly distributed throughout the country) while at the same time trying to control costs and prevent wastage of financial, technical and human resources. Allowing patients to go to any non-contracted hospital would jeopardise this careful planning at a stroke (*Müller-Fauré*, para 82). For these reasons the court found that a system of prior authorisation for intramural care was in principle 'both necessary and reasonable' on public health grounds in order to guarantee a 'rationalised, stable, balanced and accessible supply of hospital services'

provided that the conditions under which the authorisation was granted – both substantively and procedurally – could themselves be justified.

[12.34] Looking first at the *procedural* conditions, the court said that these could be justified provided the procedural system was easily accessible for patients; that the decision whether to grant authorisation was based on objective, non-discriminatory and pre-determined criteria; that the request was dealt with objectively and impartially and within a reasonable time; and that refusals to grant authorisation were capable of being challenged in judicial or quasi-judicial proceedings.

[12.35] The court then turned to the *substantive* conditions for attaining authorisation, beginning with the requirement that the treatment had to be ‘normal in the professional circles concerned’. It found this to be justified provided it took account of what was sufficiently tried and tested by *international* science (as opposed to simply national science, which would tend to favour national treatment). The court thought that the second condition, necessity, could also be justified both on grounds of public health and on ensuring the financial stability of the sickness insurance system, provided that the condition was construed as meaning that authorisation to receive treatment in another member state could be refused only if the same or equally effective treatment could be obtained without undue delay from a contracted provider in the home state. The court recognised that if contracted providers were not given priority, this would put at risk the very principle of having contractual arrangements with hospitals and so ‘undermine all the planning and rationalisation carried out in this vital sector’. Thus, while rejecting the territorial nature of healthcare services, the court did recognise the value of a ‘closed’ system based on a number of contracted providers.

[12.36] However, when considering whether the treatment could be granted without undue delay from a contracted provider, the court said that the national authorities had to consider all the circumstances of each specific case, taking into account both the patient’s medical history and condition and the degree of pain or the nature of the patient’s disability which might make it impossible or extremely difficult for the provider to carry out a professional activity. This subjective approach, based on the individual patient’s state of health, meant that a state could not refuse permission for treatment abroad simply because it would mean that the patient was jumping the waiting list queue. Therefore, in *van Riet* the Dutch sickness fund could not refuse to pay for Mrs van Riet’s treatment (an arthroscopy) in Belgium where it was available much sooner than in the Netherlands simply because appropriate treatment was available in the Netherlands without undue delay. In deciding whether to authorise treatment, the fund had to take into account Mrs Van Riet’s medical history (she had been suffering pain for eight years) and medical condition.

[12.37] The cases we have considered so far (*Geraets-Smits and Peerbooms* and *van Riet*) concerned hospital services. We turn now to

non-hospital services which were considered in *Müller-Fauré*. While on holiday in Germany, Müller-Fauré underwent major dental treatment. When the Dutch sickness fund refused to reimburse her because she had not received prior authorisation for the treatment, she argued that this breached art 49. The court agreed but this time found no justification for the authorisation requirement. It said that no evidence had been produced to show that if patients were allowed to travel to another member state for non-hospital treatment without authorisation, this would seriously undermine the financial balance of the Dutch scheme. As the court noted, care is generally provided near the patient's residence, in a cultural environment familiar to the patient and allows a relationship of trust to build up with the treating doctor. For these reasons the court anticipated that the numbers taking advantage of the possibility of (non-hospital) treatment in other member states would be small due to the barriers of language, geography, the cost of staying abroad and the lack of information about the care provided there. However, the court did add an important caveat to its ruling, which it had already mentioned in *Kohll*: patients from State A travelling to State B for such treatment but without prior authorisation could claim reimbursement of the treatment cost but only within the limits of the cover provided by the sickness insurance scheme in State A (rather than for all expenses incurred which would be the case under art 22 of Regulation 1408/71). The court also said that State A could impose other conditions on reimbursement in so far as they were neither discriminatory nor an obstacle to free movement (eg requiring that a GP should refer a patient to a specialist consultant).

[12.38] This case law tells us that medical services fall within the scope of arts 49 and 50. Prior authorisation requirements in principle breach art 49 but are likely to be justified for intramural care (where there seems to be a presumption of legality) but not for extramural care (where there seems to be a presumption of illegality) or (possibly) for systems based on reimbursement (following *Kohll*). This largely institutional distinction between intra- and extra-mural care will create a number of difficulties. Does it turn on the physical location of the treatment (GP's surgery or hospital out-patient department) or the type of treatment (minor or major surgery)?

Free movement of capital

[12.39] Free movement of capital, once the Cinderella provision of the four freedoms, is becoming increasingly litigated, especially in cases like *Re Manninen* Case C-319/02 [2005] All ER (EC) 465 concerning a taxpayer, Manninen, who was fully taxable in Finland, but held shares in a Swedish company. The profits distributed by that Swedish company in the form of dividends to Mr Manninen had already borne corporation tax in Sweden. The dividends also bore a tax in Sweden on revenue from capital by means of deduction at source. Since dividends distributed by foreign companies to Finnish taxpayers conferred no entitlement to a tax

credit in Finland, they were subject to income tax in Finland on revenue from capital at the rate of 29%. The Finnish tax Commission held that Manninen was not entitled to the tax credit in respect of dividends paid to him by a Swedish company.

[12.40] The ECJ noted that the tax credit under Finnish tax legislation was designed to prevent the double taxation of company profits distributed to shareholders by setting off the corporation tax due from the company distributing dividends against the tax due from the shareholder by way of income tax on revenue from capital. The result of this system was that dividends were no longer taxed in the hands of the shareholder. However, since the tax credit applied solely in favour of dividends paid by companies established in Finland, that legislation disadvantaged fully taxable persons in Finland who received dividends from companies established in other member states, who, for their part, were taxed at the rate of 29% by way of income tax on revenue from capital. The court noted that the Finnish rules interfered with free movement of capital in two ways: (1) by deterring fully taxable persons in Finland from investing their capital in companies established in another member state; and (2) by obstructing companies established elsewhere from raising capital in Finland. Having described the Finnish law in terms of its restrictive effects on free movement, the court then reverted back to the language of discrimination. It said that:

‘Since revenue from capital of non-Finnish origin receives less favourable tax treatment than dividends distributed by companies established in Finland, the shares of companies established in other member states are less attractive to investors residing in Finland than shares in companies which have their seat in that member state.’

The rules therefore breached art 56; the question was whether they could be saved under one of the express derogations laid down in art 58.

[12.41] These derogations are much broader than their equivalents in the field of goods, persons and services. In particular, art 58(1)(a) EC provides that: ‘... Article 56 shall be without prejudice to the right of member states ... to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to ... the place where their capital is invested.’ The court noted that since art 58(1)(a) of the Treaty was a derogation from the fundamental principle of the free movement of capital, it had to be interpreted strictly and so could not be interpreted as meaning that any tax legislation making a distinction between taxpayers by reference to the place where they invest their capital was *automatically* compatible with the Treaty. It then observed that the derogation in art 58(1)(a) EC was itself limited by art 58(3) EC, which provided that the national provisions referred to in art 58(1) ‘shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56’. The court then drew a distinction between unequal

treatment which is permitted under art 58(1)(a) EC and arbitrary discrimination which is prohibited by art 58(3). It explained that the Finnish legislation could only be regarded as compatible with the Treaty if: (1) the difference in treatment concerned situations which were not objectively comparable; or (2) it could be justified by overriding reasons in the general interest, such as the need to safeguard the coherence of the tax system, and the national legislation was proportionate.

[12.42] In respect of the first route to compatibility, the court considered that no case had been made out. It noted that both dividends distributed by a company established in Finland and those paid by a company established in Sweden were, apart from the tax credit, capable of being subjected to double taxation: in both cases, the revenue was first subject to corporation tax and then – in so far as it is distributed in the form of dividends – to income tax in the hands of the beneficiaries. Thus, where a person fully taxable in Finland invests capital in a company established in Sweden, there is no way of escaping double taxation of the profits distributed by the company in which the investment is made. Thus, shareholders who are fully taxable in Finland find themselves in a comparable situation, whether they receive dividends from a company established in Finland or from a company established in Sweden. Since there was no objective difference between the circumstances of the two situations, the difference in treatment could not be objectively justified.

[12.43] The court also found that the second route to compatibility was not made out. It confirmed its long-established case law – established primarily in the field of persons – that the need to preserve the cohesion of a tax system might justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty provided that there was a direct link between the tax advantage and the offsetting of that advantage by a particular tax levy and that the steps taken were proportionate. The court said here that even if the tax legislation was based on a link between the tax advantage and the offsetting tax levy, in providing that the tax credit granted to the shareholder fully taxable in Finland was to be calculated by reference to the corporation tax due from the company established in Finland, such legislation did not appear necessary to preserve the cohesion of the Finnish tax system.

[12.44] The court said that, having regard to the objective pursued by the Finnish tax legislation, the cohesion of that tax system was assured so long as the correlation between the tax advantage granted in favour of the shareholder and the tax due by way of corporation tax was maintained. Therefore, in this case, it would be possible for Finland to grant a tax credit calculated by reference to the corporation tax owed by that company in Sweden: this, said the court, would not threaten the cohesion of the Finnish tax system and would constitute a measure less restrictive of the free movement of capital than that laid down by the Finnish tax legislation. Finland's arguments that such an approach would have the

effect of reducing its tax receipts were swiftly dismissed: reduction in tax revenue could not be regarded as an overriding reason in the public interest which could be relied on to justify a measure which was in principle contrary to a fundamental freedom.

[12.45] The robust approach taken by the court in this case towards the justifications put forward by the member states serves as a sharp reminder that the court is now prepared to be just as demanding with the member states under art 56 as it is under the Treaty provisions on persons. Capital is truly coming in from the cold.

Citizenship

[12.46] When the concept of Union citizenship was introduced into the EC Treaty at Maastricht, it was not clear whether it would serve as a catalyst for change or merely as a rhetorical device. In recent years the court has indicated that Union citizenship has teeth and that it is destined to be 'the fundamental status of nationals of the member states' (*Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* Case C-184/99 [2003] All ER (EC) 385). Having taken this decision, the court has used Union citizenship to require a rethink of the orthodox case law on free movement of persons (*Re Collins* Case C-138/02 [2004] All ER (EC) 1005); and to justify limiting the limits to the Residence Directives – in that case Directive 90/364 on persons of independent means – by applying the principle of proportionality in a rigorous fashion (*Baumbast v Secretary of State for the Home Department* Case C-413/99 [2002] All ER (D) 80 (Sep)).

[12.47] The potentially transformative power of EU citizenship has been confirmed in two recent decisions of the Court of Justice, *Chen v Secretary of State for the Home Department* Case C-200/02 [2005] All ER (EC) 129 and *R (on the application of Bidar) v Ealing London Borough* Case C-209/03 [2005] All ER (EC) 687). *Chen's* parents, who were Chinese, wished to have a second child but this was forbidden in China due to the single child policy. With the benefit of good legal advice, Mrs Chen entered the UK when she was about six months pregnant and moved to Belfast to give birth. Under (the then) Irish law, any child born anywhere on the island of Ireland acquired Irish nationality. With her Irish passport, baby Catherine, and her mother, moved to Wales.

[12.48] The court said that Catherine, even though only eight months old, enjoyed the rights of Union citizenship. She could therefore enjoy the right to reside under art 18(1), subject to the limitations and conditions laid down by the Persons of Independent Means Directive 90/364. These she satisfied: she had both sickness insurance and sufficient resources, so that she did not become a burden on the British state. The fact that these resources came from her mother was irrelevant: the court noted that the Directive laid down no condition as to the origin of the resources, merely that they be sufficient. It concluded that a requirement as to the origin of

the resources would add to the conditions already laid down by the Directive and so would constitute a disproportionate interference with the exercise of the fundamental right of freedom of movement and of residence upheld by art 18 EC. Thus, as with *Baumbast*, the court used the citizenship principle, read in conjunction with the proportionality principle, to justify imposing limitations on the limits laid down by the residence Directive.

[12.49] *Chen* followed *Baumbast* in another respect: because Catherine, the holder of EC rights of residence, was too young to exercise those rights effectively without a carer, her mother was entitled to stay in the UK with Catherine. Thus, a third country national derived rights from a child in order to enjoy a right of residence in the UK.

[12.50] *Bidar* concerned another limit to the Residence Directives, this time the express limit found in art 3 of the Students' Directive 93/96, which provides that the host state is not required to pay maintenance grants to migrant students. *Bidar*, a French national, and his mother came to the UK in August 1998 to live with his grandmother. After his mother's death, *Bidar* continued living with his grandmother who supported him while he attended the local secondary school. In September 2001 he started reading economics at University College London. While he received assistance with his tuition fees (which were charged to him at the same rate as for British students following *Gravier v City of Liège* Case 293/83 [1985] ECR 593 and *Raulin v Minister van Onderwijs en Wetenschappen* Case C-357/89 [1992] ECR I-1027), his application for financial assistance to cover his *maintenance* costs, in the form of a student loan, was refused on the grounds that he did not satisfy the conditions laid down in the Education (Student Support) Regulations 2001, SI 2001/951. In essence, these required students to have been resident in the UK for three years prior to starting their course and to have been settled in the UK (a status that was, in practice, impossible for students to attain).

[12.51] The UK government thought that it was on safe ground in denying *Bidar* a maintenance grant and loan due to art 3 of Directive 93/96 and a decision of the court in two cases decided on the same day, *Lair v University of Hanover* Case 39/86 [1988] ECR 3161 and *Brown v Secretary of State for Scotland* Case 197/86 [1988] ECR 3205. According to these cases, at that stage of development of Community law the assistance given to students for maintenance and training fell outside the scope of the EC Treaty for the purposes of art 12 EC. However, the Court of Justice in *Bidar* had other ideas. It noted that *Bidar*, a citizen of the Union, was lawfully resident in the UK. His right of residence came from art 18, read in conjunction, not with the Students' Directive 93/96, but the Persons of Independent Means Directive 90/364, the conditions of which he was deemed to have satisfied. And because he was lawfully resident in the UK, he was entitled to equal treatment under art 12 in

respect of social assistance benefits. The court said that these benefits did now include assistance with maintenance costs whether through subsidised loans or grants. It said that given the changes that had occurred at EU level in respect of education and training since *Lair and Brown*, and now confirmed by art 24 of the Citizens' Rights Directive 2004/38, social assistance for a student 'whether in the form of a subsidised loan or a grant, intended to cover his maintenance costs' fell within the scope of application of the Treaty. *Bidar* was therefore entitled to have the principle of non-discrimination on the grounds of nationality applied to him.

[12.52] The court then said that the English rules were indirectly discriminatory: requiring students to be settled in the UK and to satisfy certain residence conditions risked placing nationals of other member states at a disadvantage, since both conditions were likely to be more easily satisfied by UK nationals. However, the court also accepted that while, in the organisation and application of their social assistance schemes, member states had to show a certain degree of financial solidarity with nationals of other member states, it was legitimate for a member state to grant assistance only to students who had demonstrated a certain degree of integration into the society of that state. This integration could be shown through a period of residence. The court suggested that a three-year residence requirement was compatible with Community law but that the requirement to be settled was not, since it was impossible for a student from another member state ever to obtain settled status.

[12.53] Three points should be noted from *Bidar*. First, the case confirms that non-economically active migrants, as Union citizens, can now enjoy benefits on the same terms as nationals, due to a 'certain degree of financial solidarity' which host states (and thus host state taxpayers) have to show with nationals of other member states. Second, the limits laid down by art 3 of the Students' Directive do not apply to those who are students but come to the host state in a capacity other than that of a student (eg where, as in *Bidar*, they come as a person of independent means).

[12.54] The third and final point relates to maintenance. Had the court ruled that maintenance grants were to be provided to all migrant students on day one of their arrival in the host state, this would have had a devastating effect on the education budgets of host states, particularly states such as the UK, which are net recipients of students. The court staved off this possibility by allowing host states to impose a proportionate residence requirement on all students prior to entitlement to maintenance grants and loans. In this way, the court retained, at least in part, the spirit of the distinction drawn in *Brown* between fees (where full equal treatment was required) and maintenance (where it was not). In reaching this conclusion, the court made an express link between

residence, integration and solidarity: the longer migrants are resident in the host state, the more integrated they are in the society of the host state and thus the more solidarity they can expect from the host state in terms of benefits. The same philosophy underpins the new Citizens' Rights Directive 2004/38. There is, however, one remaining glitch: the Directive does not require states to give migrants equal treatment in respect of maintenance grants until they have been permanently resident for five years. Given the costs involved, it might just prove too tempting for the UK to resist taking advantage of this rule and increasing the residence requirement from three years to five.

Social policy

Equal pay

[12.55] The criterion on which art 141(1) EC on equal pay is based is the comparability of the work done by workers of each sex. Yet, unlike the field of free movement of workers, where there is a voluminous case law on the meaning of the term worker, it was not until the decision in *Allonby v Accrington & Rossendale College* Case C-256/01 [2005] All ER (EC) 577 that the court grappled with the meaning of the term 'worker' in the context of equal pay (see also [11.6]–[11.9] above). It began by noting that there was no single definition of worker in Community law: the definition varied according to the area in which the definition was applied. However, as with the definition of worker under art 39, the court noted that 'worker' used in art 141(1) EC had a broad, Community, meaning. Then, drawing on its art 39 case law, the court said:

'For the purposes of that provision [art 141(1)], there must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration.'

Then, referring to the definition of pay found in art 141(2) EC, the court added that:

'It is clear from that definition that the authors of the Treaty did not intend that the term "worker", within the meaning of art 141(1) EC, should include independent providers of services who are not in a relationship of subordination with the person who receives the services.'

The court then added the caveat that:

'formal classification of a self-employed person under national law does not exclude the possibility that a person must be classified as a worker within the meaning of art 141(1) EC if his independence is merely notional, thereby disguising an employment relationship within the meaning of that article.'

[12.56] The case itself concerned teachers who used to be employed directly by a college on fixed-term contracts. Once their contracts expired they were taken on by an agency, ELS, which provided lecturers to the

college. ELS employed the lecturers under self-employed contracts. The effect of these changes was to reduce Allonby's pay. The question for the court was whether Allonby (and the other teachers) were genuinely self-employed. The court said that it was necessary 'in particular to consider the extent of any limitation on their freedom to choose their timetable, and the place and content of their work'. It continued: 'The fact that no obligation is imposed on them to accept an assignment is of no consequence in that context.' Under English law, the absence of any such obligation would be fatal to any claim by an individual that they are an employee. Under EC equal pay law, by contrast, such an individual can still be considered a worker for the purposes of a claim under art 141.

[12.57] On the facts of *Allonby's* case, this development did not help her in respect of equal pay claim brought against her previous employer the college. Ms Allonby, a part-time teacher now employed by ELS, wanted to bring an equal pay claim against the college using a male lecturer employed by the college as her comparator. The court refused to allow such a claim. Following *Lawrence v Regent Office Care Ltd* Case C-320/00 [2002] All ER (D) 84 (Sep), the court said that while there was nothing in the wording of art 141(1) to suggest that the applicability of that provision was limited to situations in which men and women work for the same employer, where the differences identified in the pay and conditions of workers performing equal work cannot be 'attributed to a single source, there is no body which is responsible for the inequality and which could restore equal treatment'. Because such a situation did not come within the scope of art 141(1), the work and pay of those workers could not be compared.

[12.58] The court concluded that even though the level of pay received by Ms Allonby was influenced by the amount which the college paid ELS, this was not a sufficient basis for concluding that the college and ELS constituted a single source to which the differences identified in Ms Allonby's conditions of pay and those of the male worker paid by the college could be attributed. As Fredman points out ('Marginalising Equal Pay Laws' (2004) 33 ILJ 281, 281), the fault-oriented model of equal pay, introduced in *Lawrence* and applied with such damaging effect in *Allonby*, overlooks the widely recognised fact that inequality of pay is frequently a consequence of institutional arrangements for which no single actor is 'to blame'. Because the court could not find fault on the part of either the college or ELS – even though the Advocate General acknowledged that the institutional arrangements had been deliberately manipulated to secure savings for the college and to avoid the consequences of the Part Time Work Directive – the loss fell on those who were least at fault, the part-time lecturers, the majority of whom were women. Thus, the triangulation of the managerial function (with the college having control over the worker but ELS having control over the remuneration) successfully drew the teeth of the (fundamental) principle of equal pay and this was condoned by a court unable 'to see beyond the formal

boundaries of the employing enterprise' (Fredman (2004) 2 ILJ 281, 281). Thus, the effect of *Allonby* is that those workers employed alongside each other in the same establishment but in different employment units could not enjoy equal pay.

[12.59] As Deakin and Morris point out (*Labour Law* (2005) para 6.80), the *Lawrence* and *Allonby* reference to 'single source' represents an unjustified gloss on the wording of art 141, which makes no reference to the employment unit as the sole basis for comparison. Although there may be practical difficulties in allowing comparisons across employment boundaries, such difficulties did not arise in these two cases: *Lawrence* was a case of a unified job evaluation scheme, *Allonby* involved work in a single establishment where there was a contract between the college and the agency. In both cases comparisons were made with former co-workers.

[12.60] However, in respect of her second claim brought against the Department for Education – that her exclusion from the Teachers' Superannuation Scheme (an exclusion based on *legislation*) was contrary to art 141 – *Allonby* was more successful. The court was asked to consider whether the requirement of being an employee (a narrower concept than worker as defined by Community law) engaged as a teacher in a specified category of educational institution (which included *Allonby's* college) as a precondition for membership of the Teachers' Superannuation Scheme (a condition deriving from state rules) was indirectly discriminatory against women. The court took as the pool teachers who were workers within the meaning of art 141(1) and who fulfilled all the conditions of membership of the pension scheme except that of being employed under a contract of employment. The court found that the requirement of being an employee was indirectly discriminatory unless it could be objectively justified.

Maternity rights

[12.61] Women on maternity leave are in a unique situation, as the court made clear in *Gillespie v Northern Health and Social Services Board* Case C-342/93 [1996] All ER (EC) 284, where it said women on maternity leave were in a special position requiring them to be afforded special protection. This situation was not comparable either with that of a man or with a woman actually at work. In respect of the payment during maternity leave, the court said that, although maternity benefit constituted pay within the meaning of art 141, neither art 141 nor art 1 of Directive 75/117 required that women should continue to receive full pay during maternity leave, nor did those provisions lay down any specific criteria for determining the amount of benefit to be paid to them during that period. The court did add, however, that the amount payable could not be so low as to undermine the purpose of the maternity leave, namely the protection of women before and after giving birth. In order to assess the adequacy of the amount payable, the national court had to take into account not

only the length of the maternity leave but also the other forms of social protection afforded by the national law in the case of justified absence from work. On the facts of the case, there was nothing to suggest that the amount of benefit granted was such as to undermine the objective of protecting maternity leave.

[12.62] The court also said in *Gillespie* that a woman on maternity leave should receive a pay rise awarded before or during that period. It said that the benefit paid during maternity leave was equivalent to a weekly payment calculated on the basis of the average pay received by the worker at the time when she was actually working and which was paid to her week by week, just like any other worker. The principle of non-discrimination therefore required that a woman who was still linked to her employer by a contract of employment or by an employment relationship during maternity leave had to benefit from any pay rise, even if backdated. To deny her such an increase would discriminate against her purely in her capacity as a worker since, had she not been pregnant, she would have received the pay rise.

[12.63] In *Gillespie*, the maternity pay was calculated on the basis of a woman's average earnings over an eight-week reference period which was taken between the fourth and sixth month of pregnancy when the woman was most likely to be well. The pay increase she benefited from occurred after the reference period but was backdated to the reference period. In *Alabaster v Woolwich plc, Secretary of State for Social Security* Case C-147/02 [2005] All ER (EC) 490 the woman also benefited from a pay rise prior to her maternity leave but after the reference period, but this time the pay rise was not backdated (see [11.10]–[11.11] above). The court extended its ruling in *Gillespie* to cover this situation, so that 'any pay rise awarded after the beginning of the period covered by her reference pay must be included in the elements of pay used to determine the amount of pay owed to the worker during her maternity leave'.

Transfer of undertakings

[12.64] The Transfer of Undertakings Directive 2001/23 establishes three pillars of protection for employees. First, it provides for the automatic transfer of the employment relationship with all of its rights and obligations from the transferor to the transferee in the event of a transfer. Secondly, it protects workers against dismissal by the transferor (the natural or legal person who, by reason of the transfer, ceases to be the employer in the undertaking) or transferee (the natural or legal person who becomes the employer). This is, however, subject to the employer's right to dismiss employees for 'economic, technical or organisational reasons entailing changes in the workforce'. Thirdly, the Directive requires the transferor and the transferee to inform and consult the representatives of the employees affected by the transfer. The question that has long troubled the court is whether the transfer at issue constitutes a 'transfer of

an undertaking' for the purposes of the Directive. This has been a particular problem in cases involving the public sector. In particular, in *Henke v Gemeinde Schierke and Verwaltungsgemeinschaft Brocken* Case C-298/94 [1997] All ER (EC) 173 the court ruled that the reorganisation of structures of public administration or the transfer of administrative functions between public administrative authorities did not constitute a 'transfer of an undertaking' within the meaning of the Directive. Mrs Henke was employed as secretary to the mayor's office of the municipality of Schierke. When the municipality of Schierke and other municipalities formed an 'administrative collectivity', to which it transferred administrative functions, the municipality of Schierke dismissed Mrs Henke. In an extremely terse judgment, the court said that the purpose of a number of municipalities grouping together was to improve the performance of those municipalities' administrative tasks. The transfer carried out between the municipality and the administrative collectivity related only to activities involving 'the exercise of public authority'. The court said that even if it was assumed that those activities had aspects of an economic nature, they could only be ancillary.

[12.65] In *Henke* the court, therefore, focused on the fact that the authority was not a business exercising an economic activity, as required by the EC Treaty, but was involved with public administration exercising public law powers. The court, however, made no reference to its earlier decision in *Sophie Redmond Stichting v Bartol* Case C-29/91 [1992] ECR I-1389, where it had considered that the term 'legal transfer' covered the situation where a public authority decided to terminate the subsidy paid to one legal person, as a result of which the activities of that person were fully and definitively terminated, and to transfer it to another legal person with a similar aim. It also did not refer to *EC Commission v United Kingdom* Case C-382/92 [1994] ECR I-2435, where the court found that the British 'non-commercial venture' exclusion from the British Regulations implementing the Directive breached the Directive. Nevertheless, the Council of Ministers followed the court's approach. Article 1(1)(c) of Directive 2001/23 provides that: 'An administrative reorganisation of public administrative authorities, or the transfer of administrative functions between public administrative authorities, is not a transfer within the meaning of this Directive.'

[12.66] However, in subsequent cases, the court appears to have given a restrictive reading to its decision in *Henke*. In particular, a 13-judge court in *Mayeur v Association Promotion de l'information meesine (APIM)* Case C-175/99 [2000] ECR I-7755 found that the transfer to the city of Metz of activities previously carried out by APIM, a non-profit making association set up as an independent entity by the city of Metz, funded by the city to promote the attractions of Metz, constituted a transfer of an undertaking. By referring to the broad definition of undertaking, to the fact that APIM was a distinct legal entity from the city of Metz, and to the fact that APIM carried out an economic activity (publicity and

information services on behalf of the city of Metz), the court was able to conclude that there was a transfer of an undertaking. It said that ‘activity of this kind, consisting in the provision of services, is economic in nature and cannot be regarded as deriving from the exercise of public authority’.

[12.67] Thus, the key feature which distinguishes public sector reorganisation cases to which the Directive does not apply (*Henke*) from those cases to which the Directive does apply (*Mayeur*) is the ‘exercise of public authority’. While the meaning of this phrase is not entirely clear, it would appear that *Henke* will apply to cases involving no more than a reorganisation of public administrative structures or the transfer of administrative functions between public administrative authorities. The Directive will, however, apply where the activity is non-profit making or carried out in the public interest. This is confirmed by art 1(1)(c) of Directive 2001/23, which provides that the Directive applies to public or private undertakings engaged in economic activities, whether or not they are operating for gain.

[12.68] The exceptional nature of the court’s decision in *Henke* was further confirmed in *Delahaye v Ministre de la Fonction publique et de la Réforme administrative* Case C-425/02 [2005] All ER (EC) 575 (see also [11.12]–[11.17] above), where the court noted that the transfer of an economic activity from a legal person governed by private law to a legal person governed by public law is in principle within the scope of Directive. It continued: ‘Only the reorganisation of structures of the public administration or the transfer of administrative functions between public administrative authorities is excluded from that scope.’

[12.69] If there is a transfer of an undertaking within the meaning of the Directive, then the transferee is obliged to respect the terms and conditions of employment of the transferred employees. A question which has long troubled employers is whether the transferee (or even the transferor) can vary the contractual terms of the transferred employees to bring the transferred employees’ terms and conditions into line with those of the staff already employed by the transferee. For the transferee this is important in terms of administrative convenience, good industrial relations, and probably cost saving. In the past, the court has prohibited changes to the terms and conditions of employment even where employees consent to this. Thus, in *Foreningen af Arbejdsledere i Danmark v Daddy’s Dance Hall A/S* Case 324/86 [1988] ECR 739 the court said that since the protection conferred by the Directive is a ‘matter of public policy, and therefore independent of the will of the parties to the contract of employment’, the rules of the Directive had to be considered ‘mandatory, so that it is not possible to derogate from them in a manner unfavourable to employees’. The court continued:

‘It follows that employees are not entitled to waive the rights conferred on them by the directive and that those rights cannot be restricted even with their consent. This interpretation is not affected by the fact that, as in this

case, the employee obtains new benefits in compensation for the disadvantages resulting from an amendment to his contract of employment so that, taking the matter as a whole, he is not placed in a worse position than before.'

[12.70] However, the court did suggest that the terms and conditions of employment could be amended, even in a manner unfavourable to employees, in one situation: where national law allows such an amendment. The reasoning behind this is that because the Directive is only a Directive of partial harmonisation, it is only intended to prevent employees affected by a transfer of an undertaking from being placed in a less favourable position than had the transfer not occurred; it is not intended to establish a uniform level of protection throughout the Community on the basis of common criteria. Therefore, if national law permits contractual variation then this law applies equally to transferees.

[12.71] However, the case law makes clear that while contractual variation can occur, 'the transfer of the undertaking itself may never constitute the reason for that amendment'. While the principle is clear, its application is not. Can a transferor cut the pay of the transferred staff so as to bring their pay with the remuneration received by the transferor's existing staff? Would this be a variation due to a situation 'other than the transfer of an undertaking'? This issue arose in *Martin v South Bank University* Case C-4/01 [2003] All ER (D) 85 (Nov), where the court found that the transferee (SBU) had changed the terms and conditions concerning early retirement of the Whitley Council scheme, which the NHS employees had previously enjoyed, with the transferor to bring those terms into line with those offered to its other employees and so the 'alteration of the employment relationship must be regarded as connected to the transfer' and is not permitted.

[12.72] *Delahaye* goes further and suggests that even changes of contract *connected with* the transfer are permissible provided that they are not substantial. The case concerned the transfer of training services from the private sector to the public sector in Luxembourg. Mrs Boor was duly transferred but her pay was cut by 37% due to the fact that her years of service with the transferor had not been taken into account. In another terse judgment, the court said the Directive had to be interpreted as 'not precluding in principle', in the event of a transfer the new employer, 'from reducing the amount of the remuneration of the employees concerned for the purpose of complying with the national rules'. However, the court went on to say that the competent authorities responsible for applying and interpreting those rules were obliged to do so as far as possible in the light of the purpose of the Directive (namely to provide for protection of employees in the event of a change of employer). It continued that if the reduction in pay is substantial, such a reduction constitutes a substantial change in working conditions to the detriment of the employees concerned by the transfer and this gives grounds for a claim of constructive dismissal against the transferee under art 4(2).

Evidence

JOHN JACKSON, BA, LLM

Barrister-at-Law, Professor of Public Law, Queen's University, Belfast

KATIE QUINN, LLB, MSc

Lecturer in Law, Queen's University, Belfast

The presumption of innocence

[13.1] Last year we promised to review the attempt by the House of Lords in *Sheldrake v DPP; A-G's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 All ER 237 to provide guidance on the vexed issue of the impact of art 6 of the European Convention on Human Rights on reverse onus provisions. We were not optimistic, however, that this attempt would prove any more definitive than previous attempts by the House of Lords and the Court of Appeal to provide guidance in this area. A considered reflection on how their Lordships came to their decisions in both these cases will show why.

[13.2] *Sheldrake* was concerned with the effect of a provision in road traffic legislation which made it a defence for a person charged with being drunk in charge of a motor vehicle to prove that there was no likelihood of his driving the vehicle while drunk. By a majority the Divisional Court held that although there was an objective justification for imposing upon the accused a burden with regard to the likelihood of his driving, as this was a matter peculiarly within his knowledge, the state had failed to show that the legislative means adopted were not greater than necessary (see [2003] EWHC 273 (Admin), [2003] 2 All ER 497, reviewed in All ER Rev 2003 at [13.1]–[13.12]). Considerable weight was put by the majority on the fact that the offence was one which was truly criminal and involved moral fault. Whether there was a likelihood of the accused driving was part of the essence of the offence because it was the risk of driving whilst unfit that threatened lives and property on the roads. In these circumstances it would be expected that the burden of proving such an essential feature of the offence should be on the prosecution. The only feature which pointed to the possible necessity of imposing a legal burden on the accused was that the accused's intention to drive was within his peculiar knowledge but once the accused had indicated that his evidence was that he did not intend to drive, the prosecution would be able to test that against other circumstances and, depending on the particular facts, by evidence.

[13.3] Their Lordships have now unanimously reversed this decision. First, they concluded that the likelihood of driving was not an ingredient

of the offence. Although the provision in the legislation making it a defence to show that there was no likelihood of the defendant driving while unfit infringed the presumption of innocence, the provision was aimed at a legitimate objective, namely the prevention of death, injury and damage caused by persons unfit to drive. The imposition of a legal burden in these circumstances, requiring the defendant to show that there was no likelihood of his driving – a matter within his own knowledge and state of mind at the material time – did not go beyond what was necessary in the circumstances.

[13.4] Their Lordships' decision in this case, however, is to be contrasted with the view that they took in the other case before them concerning the effect of s 11(2) of the Terrorism Act 2002, which provides that it is a defence for a person charged with belonging to a proscribed organisation to prove (a) that the organisation was not proscribed when he became a member of it and (b) he did not take part in the activities of the organisation at any time while it was proscribed. As reported last year (All ER Rev 2004 at [13.1]–[13.5]), the Court of Appeal ([2003] EWCA Crim 762, [2004] 1 All ER 1) considered that the 'gravamen' of the offence had to be identified, first of all, in order to determine whether a provision infringes the presumption of innocence. In *R v Lambert* [2001] UKHL 37, [2001] 3 All ER 577 the gravamen was guilty knowledge; in *Sheldrake* it was the risk of driving whilst unfit. But in this case s 11(2) identified a very specific exception applicable to a limited class of defendants which did not affect the full criminal offence in s 11(1) and did not infringe the presumption of innocence so as to breach art 6(2).

[13.5] This decision has now been reversed in part by a 3:2 majority of the House of Lords. Their Lordships upheld the view that s 11(2) added no ingredient to s 11(1) and accepted that s 11(2), which was intended to impose a legal burden on a defendant, was directed to the legitimate end of deterring individuals from participating in terrorist activity. A majority of their Lordships considered, however, that the provision should be 'read down' to impose only an evidential burden: otherwise there would be a real risk of an unfair conviction if an innocent person could only exonerate himself by proving the defence in s 11(2) on the balance of probabilities. While a defendant might reasonably be expected to show that the organisation was not proscribed when he became a member (s 11(2)(a)), it might be impossible for him to show that he had not taken part in the activities of the organisation at any time while it was proscribed (s 11(2)(b)).

[13.6] In his judgment Lord Bingham attempted to develop a principled test for deciding whether reverse onuses may be justified as reasonable and proportionate to a legitimate aim which is founded on whether a defendant was being asked to prove his or her innocence in relation to conduct that could be considered blameworthy. In *Sheldrake* there was an obvious risk that when a person is in control of a car when unfit he may

drive it. Originally, road traffic legislation criminalised the conduct of those who were in charge of cars when drunk or unfit and there was no reference to the likelihood of driving. Later, however, Parliament provided a specific defence to show that there was in the circumstances no likelihood of his driving while unfit, but if a defendant fails to establish this he falls within a class of persons whom Parliament has legislated to criminalise. The nature of the conduct singled out for criminalisation under s 11 of the Terrorism Act was, however, different from the road traffic offence because it was sufficiently wide to include persons who because they joined an organisation at a time when it was not proscribed could not be regarded as blameworthy or such as properly to attract sanctions and who now that it was proscribed might be unable to dissociate themselves from the organisation. In these circumstances there was a clear breach of the presumption of innocence and a real risk of unfair conviction if these persons were made to discharge a legal burden to prove their innocence.

[13.7] Lord Bingham made a valiant attempt here to adopt a principled approach towards deciding on the justification for reverse onuses but it would seem to founder on the rock of uncertainty. As other commentators have pointed out, there is scope for considerable disagreement as to whether the prohibited conduct is morally blameworthy or not. Ashworth has asked, for example, is someone who has had several drinks and decides to sleep in the back of his or her car not to be considered innocent? (see commentary in [2005] Criminal Law Review 219). Even if there could be agreement on the issue of blameworthiness, it would seem from the dissenting speeches of Lord Rodger and Lord Carswell that other factors apart from blameworthiness may provide the rationale for criminalising conduct. Lord Rodger accepted that s 11(1) could catch innocent persons but, in his Lordship's view, criminalising membership serves the legitimate aim of making it difficult for criminal organisations to organise themselves publicly and there was nothing in the Convention to prevent states enacting and prosecuting offences of this kind, irrespective of how or why persons came to belong to such organisations. When Parliament made a limited exception to the rule where the defendant is in an organisation before it was proscribed, it must inevitably be then for the defendant to satisfy the court that the preconditions had been met. In this respect defendants under s 11(1) were in precisely the same position as a defendant such as Mr Sheldrake, who is proved to have been in charge of a vehicle over the prescribed alcohol limit and who has to prove that there was no likelihood of his driving while in that condition.

[13.8] The scale of the disagreement on this issue between their Lordships and between the House of Lords and the Court of Appeal offers few crumbs of comfort for those who would like to see a clearer and more principled approach develop in the future (see, for example, Ashworth (above) and Dennis 'Reverse Onuses and the Presumption of

Innocence: In Search of Principle' [2005] Criminal Law Review 901). In its attempt to clarify the law last year, an enlarged Court of Appeal in *A-G's Reference (No 1 of 2004)* [2004] EWCA Crim 1025, [2005] 4 All ER 457 (see also [10.44]–[10.45] above) had considered that there was a difference of approach between the two House of Lords cases of *R v Johnstone* [2003] UKHL 28, [2003] All ER 884 and *Lambert* and sought to discourage the courts from citing any authority as guidance other than *Johnstone*. For his part, however, Lord Bingham considered that nothing said in *Johnstone* suggested any intention to depart from what was said in *Lambert*. In a re-assertion of the authority of the House of Lords as the primary domestic authority on reverse burdens, he refused to endorse the guidance given by the Court of Appeal. The task of the court was never to decide whether a reverse burden should be imposed on a defendant, but always to assess whether a burden enacted by Parliament unjustifiably infringed the presumption of innocence. His Lordship went on to question the assumption made by the Court of Appeal that Parliament would not have made an exception without good reason. Such an approach Lord Bingham thought may lead the court to give too much weight to the enactment and too little to the presumption of innocence and the obligation imposed on it by s 3 of the Human Rights Act 1998.

[13.9] Welcome as this particular clarification may be, it still leaves scope for considerable disagreement as to how reverse burdens should be interpreted in the light of s 3. It seems unlikely from the experience of the recent case law that we are going to obtain the kind of guidance that has been called for. A considerable amount of judicial time and effort has already been devoted to this issue to such little effect. Although Ashworth is right to think that we could do better in trying to formulate coherent principles in this area, it has to be asked whether the effort that has been expended by the courts to develop principles of fairness in this area has been worth it. Arguments of fairness can frequently cut both ways. One of the factors which their Lordships spent some time agonising over in both the cases before them was the question as to the ease of proof required to bear the burden. On the one hand, in a case under s 11 of the Terrorism Act, the defendant may find it difficult, if not impossible, to prove that he or she did not participate in the activities of the organisation. On the other hand, as Lord Carswell said, the prosecution might find it very difficult to prove that the defendant had taken part in activities of an organisation after it has been proscribed.

[13.10] It is clearly important as a matter of principle to be able to determine whether the burden that falls upon a defendant to come forward with a defence is one that is legal or evidential as this clearly affects the scale of the burden that needs to be discharged. But from the point of view of the decision-maker, the burden of proof may only come into play at the point when it is unclear as to which side to believe. As a matter of practice, whether the defendant bears an evidential or a legal

burden on an issue, it is incumbent on the defence to come up with convincing evidence as there is a danger that whatever the burden, he or she will simply not be believed.

[13.11] It has been a consistent refrain in these Reviews to highlight the attraction of the view expressed by the Criminal Law Revision Committee in 1972 that ‘both on principle and for the sake of clarity and convenience in practice, burdens should be evidential only’ (Eleventh Report, Evidence (General), Cmnd 4991, para 140). But this solution would also seem to be outside our grasp. In the absence of such a solution, the courts’ task in the end is to attempt to interpret reverse burden clauses in a Convention-compliant manner and take account of the Strasbourg jurisprudence. In an early part of his judgment, Lord Bingham helpfully summarised the principles that have emerged from Strasbourg as follows at [21]:

‘The convention does not outlaw presumptions of fact or law but requires that these should be kept within reasonable limits and should not be arbitrary. It is open to states to define the constituent elements of a criminal offence, excluding the requirement of *mens rea*. But the substance and effect of any presumption adverse to a defendant must be examined, and must be reasonable. Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption.’

As Dennis has said in his review of the Strasbourg authorities, this approach emphasises the procedural significance of the presumption of innocence rather than the substantive issues of fairness at stake: a concern with how presumptions of fact or law are actually applied to the defendant and the court’s freedom to adjudicate the issues. The Strasbourg courts emphasise this approach because, as Dennis says, the European Court reviews the fairness of the trial as a whole after the event. But another reason may be that it has not needed to get especially involved in adjudicating on the fairness of evidential and persuasive burdens which, as Lord Rodger reminds us in his judgment, are very much a product of the adversarial system of criminal procedure favoured in English-speaking countries but which have no counterpart in civil law systems. In the end, then, while it is important for adversarial systems that the parties know whether a burden is a persuasive or an evidential one, this is not a matter that is likely to vex the Strasbourg court, which has always tried to establish principles of fairness that are not embedded too deeply in the structure of the specific procedural systems of member states (see eg Jackson ‘The Effect of Human Rights on Criminal Evidentiary Processes’ (2005) 68 MLR 737).

Confession evidence

[13.12] Two important House of Lords judgments on confession evidence were reported this year in the All England Law Reports. The first, *R v Hayter* [2005] UKHL 6, [2005] 2 All ER 209, was a controversial decision on the use of a confession of one co-accused against another co-accused in a joint trial and saw the House of Lords divided in a 3:2 judgment. The three defendants were indicted as principals for murder. At trial the prosecution case was that the first defendant (the wife) had arranged with the second defendant (the middleman) for the contract killing of her husband and that the middleman had paid the third defendant (the killer) to carry out the killing. The evidence against the wife was cogent and came from a number of sources. The main evidence against the killer was a confession which he allegedly made to his girlfriend which also implicated the middleman and the wife. At the close of the prosecution case, the middleman submitted that he had no case to answer. The trial judge rejected this submission and held that if the jury concluded on the evidence admissible against him that the killer was guilty then that conclusion would be relevant in considering the case against the middleman. In his summing up, the judge directed the jury to consider the case against the killer first, then that against the wife and finally the case against the middleman. He told the jury that only if they found the wife and the killer guilty of murder was it open to them, taking into account those findings of guilt together with other evidence against him, to convict the middleman. The jury were also directed that the confession of the killer was only evidence against him and not against the other two co-accused. The jury convicted all three of murder and the middleman appealed against the conviction. He argued that the trial judge had erred in refusing to withdraw the case from the jury at the close of the prosecution case when there was insufficient admissible evidence against him to amount to a case to answer and in directing the jury that if they convicted the killer they could use that finding of guilt as evidence against him. The appeal was dismissed by the Court of Appeal and the middleman appealed to the House of Lords.

[13.13] Lord Steyn and Lord Brown (with whom Lord Bingham agreed) delivered the opinions of the majority. Lord Steyn first considered the rule regarding confessions implicating persons other than the maker and addressed the submission of the appellant that the trial judge, by allowing the jury to use the finding of guilt in respect of the killer as evidence against the middleman, had in effect allowed the jury to use the killer's confession as evidence against the middleman. This argument, his Lordship said, could be rejected on grounds of both logic and policy. As a matter of logic, Lord Steyn argued that if a finding of guilt in respect of the killer were based not on a confession but on eye witness, fingerprint or circumstantial evidence, the jury would be permitted to use that finding as evidence against the middleman. His Lordship acknowledged that these types of evidence are different from confession evidence, as in the present

case, as they would not implicate the co-accused but both Lord Steyn and Lord Brown asserted that there was no rational reason why a finding of guilt on the basis of a confession should be treated differently from such a finding on the basis of other types of evidence. As the trial judge had made it clear to the jury that they were not to take into account the words or content of the killer's confession in the case against the middleman, only their finding of guilt in respect of the killer, there was, according to the majority, no direct or indirect infringement of the rule that a confession is only evidence against its maker.

[13.14] Further, as a matter of policy, their Lordships pointed out that, as s 74 of the Police and Criminal Evidence Act 1984 (PACE) permits evidence of a conviction in an earlier trial to be admissible, there is no reason why a finding of guilt in respect of one accused in a joint trial cannot not be considered by the jury as evidence against another co-accused. The fact that the secondary party would be in an even better position to challenge the evidence against the principal in a joint trial lent support to this view. In the event that this analysis was incorrect, Lord Steyn concluded (at [25]) that only a 'modest adjustment' to the rule regarding confessions of co-accused in joint trials would be necessary to allow the approach taken by the trial judge and the superior courts, an adjustment their Lordships were prepared to endorse. Lord Brown recalled that the rationale for the exception to the rule against hearsay in respect of confessions was that a statement made against the maker's interests is likely to be true but queried, therefore, why such a statement could not also be used against a co-accused. His Lordship drew a distinction between those parts of co-accused A's statement which implicate A (and may indirectly implicate B) and those which directly implicate B, which are less likely to be true. Provided the jury is directed that they can use A's confession against B only if they are sufficiently sure of its truth to justify convicting A, and they are expressly directed to disregard anything in A's statement which otherwise incriminates B, this approach can be justified. According to Lord Brown, a jury would not find it any more difficult to follow a direction to separate those parts of A's confession which only implicate A and those which also implicate B, than they would a direction that A's out of court admission was only evidence against A and not against B. In relation to the trial judge's ruling on the submission of no case to answer, the majority also rejected this ground for appeal. Lord Brown was of the view that if the finding of guilt of the killer could be used by the jury, there was enough evidence already adduced at the close of the prosecution case to establish a case to answer and Lord Steyn concluded that the trial judge was fully entitled to make a conditional ruling in respect of the finding of guilt of the killer at that stage of the proceedings.

[13.15] The conclusion of the majority in *Hayter* is not persuasive and is troubling in number of respects. Indeed, there is some force in the general criticism of one of the dissenting judges Lord Rodger who remarked

(at [51]) that: 'The "modest 'erosion"' of the hearsay rule [proposed by the majority] simply obliterates the rule as it applies to statements of co-defendants in a joint trial.' The difficulties with the approach of the majority were outlined in full in the dissenting judgments of Lord Rodger and Lord Carswell. Lord Rodger began by discussing the appellant's argument surrounding s 74(1) of PACE and pointed out that, had the Crown wished to avail themselves of this provision, they could have proceeded against the killer first and then, had he been convicted, adduced the conviction in the subsequent trial of the middleman. Instead, the Crown had chosen to proceed by way of joint trial with the advantages that that entails. If the middleman was tried separately, the admissions of the killer would clearly have been excluded as hearsay. But in the joint trial, such evidence was heard by the jury only because it formed the main evidence against the killer but should not in any way have been used as evidence against the middleman. If this were not the case, evidence which would not be admissible against the middleman in a separate trial would be admissible against him if tried alongside the killer and such joint trials would clearly be opposed as prejudicial to the co-accused. As the killer's admission would not have been admissible at a separate trial of the middleman, the trial judge would have had to sustain a submission of no case to answer, and the situation should be no different in a joint trial. Lord Rodger rejected the distinction drawn by the trial judge and Court of Appeal and endorsed by Lord Brown, between those parts of the killer's confession which implicated him (and indirectly implicated the middleman) and those which directly implicated the middleman. According to Lord Rodger, all aspects of the killer's confession incriminated the middleman as it was an essential part of the case against him that the killer murdered the victim, and consequently no part of that confession should have been used as evidence against the middleman. Although his Lordship did not believe that authority was needed to support this fundamental principle, the decision of the Court of Appeal in *R v Spinks* [1982] 1 All ER 587 lent some support to his conclusion and several Scottish cases which directly endorsed his approach were cited. If the jury were allowed to use not the killer's confession, which could not be used as evidence against the middleman, but only their finding of guilt in respect of the killer as evidence against the middleman, the jury would be given, according to both Lord Carswell and Lord Rodger, 'a power to turn inadmissible into admissible evidence, and to convict a defendant by using evidence that is inadmissible against him' (at [47]). If such an approach were allowed, there is no reason why the jury should be limited to using only the 'fact' that the killer killed the deceased and not any other conclusions they reached as a result of the killer's confession, for example, that the middleman paid him to do so. Lord Carswell was also concerned that juries would be unnecessarily confused by such directions. According to Lord Rodger (at [51]):

‘[O]n the Crown’s approach, what the jury are being asked to do is use their conclusions on the evidence against A in the case against B. That is tantamount to using the evidence itself, which is admissible against A, as evidence against B, against whom it is inadmissible.’

[13.16] His Lordship recognised that the rule against hearsay generally and the rule regarding confessions of co-accused in particular are capable of producing anomalies, but stressed the undesirability of the House altering the law on hearsay evidence, drawing support from the majority in *Myers v DPP* [1964] 2 All ER 881. According to Lord Reid in *Myers* such modifications should only be made where to do so would produce certainty or finality. Both dissenting judges stressed that the creation of exceptions to the rule against hearsay is, according to Lord Bridge in *R v Blastland* [1985] 2 All ER 1095, a job for the legislature and not the judiciary. This approach was, they felt, particularly pertinent in this case as the Law Commission’s extensive review of the law of hearsay (*Evidence in Criminal Proceedings: Hearsay and Related Topics* (Law Com no 245 (1997))) did not recommend any changes to the law regarding confessions of co-accused in criminal trials and no such changes were made when Parliament enacted the Criminal Justice Act 2003. In any event, the modification suggested would lead to greater uncertainty as joint and separate trials would be liable to result in different verdicts and applications for separate trials would no doubt increase. It is difficult to argue as a matter of principle with the conclusions of the minority in *Hayter* and the suggestion that it is for Parliament and not the courts to modify this complex area of evidence law cannot be faulted. It is surprising, in the light of many recent criticisms of juries (for example, the allegations of bias in *R v Connor*; *R v Mirza* [2004] UKHL 2, [2004] 1 All ER 925), that the majority took such a favourable view of their ability to grapple with difficult issues such as disentangling conclusions from confessions from the full content of confessions, without prejudicing the defendant. This rather naïve approach fails to provide a satisfactory justification for the introduction by way of judicial legislation of such a radical departure from the rule regarding confessions of a co-accused in a joint trial.

[13.17] The decision of the House of Lords is in *R v Mushtaq* [2005] UKHL 25, [2005] 3 All ER 885 was by contrast less problematic and addressed the question of the appropriate jury direction in a case where a judge had admitted confession evidence at voir dire but the defendant argued before the jury that the confession was obtained by oppression or other improper means. The defendant was tried for conspiracy to defraud and with having in his possession material designed or adapted for the making of false instruments, and applied at trial for a statement he had made to the police to be excluded under s 76(2) of PACE on the ground that it was obtained as a result of oppression by the police officers who interviewed him. The trial judge heard evidence on this issue at voir dire and ruled that the statement was admissible. At trial the defendant again

alleged before the jury that the statement was not made voluntarily. In his summing up, the judge directed the jury that, if they were not sure, for whatever reason, that the confession was true, they should disregard it but if they were sure it was true they could rely on it even if it had, or might have been, obtained by oppression or other improper circumstances. The defendant was convicted and appealed arguing that the judge should have directed the jury to disregard the confession if they found that it was obtained by oppression or other improper means and that the direction given was incompatible with the defendant's right to a fair trial under art 6(1) of the European Convention on Human Rights. The Court of Appeal dismissed the defendant's appeal but certified the following point of general public importance:

'Whether in view of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, a judge, who has ruled pursuant to s 76(2) of the Police and Criminal Evidence Act 1984 that evidence of the alleged confession has not been obtained by oppression, nor has it been obtained in consequence of anything said or done which is likely to render unreliable any confession, is required to direct the jury, if they conclude that the alleged confession may have so been obtained, they must disregard it.'

The House of Lords unanimously dismissed the appeal but were divided 4:1 in their answer to the certified question.

[13.18] Lord Rodger (with whom Lord Steyn and Lord Phillips concurred) delivered the leading opinion of the majority. His Lordship asserted that the rationale for the exclusion of an involuntary confession is not only its potential unreliability but also, on the basis of more recent authorities (eg *Lam Chi-ming v R* [1991] 3 All ER 172), the principle that a man ought not be compelled to incriminate himself and the importance attached to proper behaviour by the police. As the purpose of s 76(2) is to exclude from the consideration of the jury confessions obtained by oppression or other improper means, it would be inconsistent with policy if a jury was allowed to rely on a confession which they properly considered was or may have been obtained in that way. The jury should, accordingly, be directed to disregard a confession if they consider that it was, or might have been, obtained by oppression or other improper means. According to Lord Rodger, the House in adopting this approach was returning to the direction supported by the Court of Criminal Appeal in *R v Bass* [1953] 1 All ER 1064, where Byrne J stated that the jury should be directed that if they are not satisfied that the confession was made voluntarily, they should 'give it no weight at all and disregard it' (at 684). Further support for Lord Rodger's conclusion was found in the right to a fair trial under art 6(1) of the European Convention on Human Rights, which contains within it an implied right against self-incrimination. The jury, which alongside the judge is the public authority for the purposes of s 6 of the Human Rights Act 1998, was invited to consider a confession which was or may have been obtained by

oppression or other improper means and therefore to act in a way which was incompatible with the defendant's art 6(1) right to a fair trial. Consequently, the direction itself breached the defendant's right against self-incrimination under art 6(1). Lord Carswell, who was broadly in agreement with the majority, went a little further concluding that art 6(1) required more than a return to *Bass*. In his Lordship's opinion, the jury should be directed that unless they are satisfied beyond reasonable doubt that the confession not obtained by oppression or other improper means, they should disregard it. Despite the conclusion of the majority, the House found that the conviction was safe, as no evidence of oppression had been put before the jury which would have required a direction to disregard the confession if it was or may have been obtained by oppression.

[13.19] Lord Hutton took a different view, emphasising the division of labour between the judge and jury in a criminal trial, with admissibility being a matter for the judge and weight a matter for the jury. His Lordship asserted that if the jury were directed in the manner proposed, they would be asked to decide not what weight to attach to the confession but essentially the issue of admissibility, that is 'facts relevant to the question whether it could be taken into account as evidence' (at [14]). Although his Lordship, like the majority, recognised the importance of the privilege against self-incrimination in the light of art 6(1), he concluded that the direction given at trial did not offend against this principle. In the opinion of Lord Hutton, the defendant's right not to incriminate himself is protected by the judge and his right not to be convicted on the basis of a confession which may be untrue because it was obtained by oppression or other improper means is protected by both the judge and the jury, who are entitled to reject the confession as unreliable on the ground that there is a reasonable possibility that it is untruthful if they are not satisfied that it was not obtained by oppression or improper conduct. Although the point was made that a jury would rarely rely as truthful on a confession which was obtained by oppression or other improper means, it cannot be denied that the potential for this to happen remains a possibility with Lord Hutton's approach. The ongoing impact of the European Convention on Human Rights would seem to require the adoption of the direction proposed by the majority of the House.

Vulnerable witnesses

[13.20] In *R (on the application of D) v Camberwell Youth Court; R (on the application of the DPP) v Camberwell Youth Court* [2005] UKHL 4, [2005] 1 All ER 999 the House of Lords was given an opportunity to rule on the Convention compatibility of the special measures introduced for vulnerable witnesses under the Youth Justice and Criminal Evidence Act 1999. These measures provide, inter alia, that, save in exceptional circumstances, the evidence of witnesses under 17 years of age have to be given by live television link and, where available, by suitable video

recording in cases involving sexual offences and offences involving violence. The cases before their Lordships arose out of decisions by justices in the youth court. In the case of *D*, the justices had ordered that the evidence of child witnesses then aged 13 or 14 be given by live link in prosecutions for robbery of child defendants then aged 14, 16 and 15. In the second case the justices had refused to make special measures directions in the form of live link and video-recorded interviews. In her judgment Lady Hale dealt with three strands in the arguments presented by the appellants: first, the limited power to disapply the primary rule in the interests of justice; second, the procedural requirements of a fair trial under art 6 of the Convention; and third, the 'equality of arms' principle also derived from art 6.

[13.21] The first argument contended that while it was permissible for there to be a statutory presumption in favour of special measures for child witnesses, the power in s 24(3) to permit a witness to give evidence in any other way if it appears to be in the interests of justice to do so contemplated a time after the special measures directions had already been given, with the result that the court was unable to disapply the rule at the outset if there was a risk of injustice. Lady Hale considered that it was clear that by enacting the primary rule and limiting the circumstances in which it may be disapplied, Parliament did not mean to allow defendants to challenge the use of a video recording or live link simply because it was a departure from the normal procedure in criminal trials. Assuming that there was nothing intrinsically unfair in children giving their evidence in this way, her Ladyship considered that it was very difficult to think of reasons which might make a live link or the admission of a recording unjust that were unrelated to issues that might arise at the trial after the measures had been directed such as the quality of the equipment on the day, the content and quality of the video recording or the unavailability of the recorded witness for cross-examination.

[13.22] This led on to the second argument that the whole approach that Parliament has adopted in deciding what the norm should be when child witnesses give evidence is contrary to the defendant's right to a fair trial guaranteed by art 6 of the European Convention on Human Rights. The relevant parts of art 6(1) require that in the determination of any criminal charge against him everyone is entitled to a fair and public hearing and under para 3 (d) that everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him. Lady Hale considered (at [48]) that the basic principles governing these provisions were most conveniently enunciated by the European Court of Human Rights in *Kostovski v Netherlands* (1989) 12 EHRR 434 at 447–448 as follows:

'39. It has to be recalled at the outset that the admissibility of evidence is primarily a matter for regulation by national law. Again, as a general rule it is for the national courts to assess the evidence before them ...

41. In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. This does not mean, however, that in order to be used as evidence statements of witnesses should always be made at a public hearing in court: to use as evidence such statements obtained at the pre-trial stage is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6, provided the rights of the defence have been respected.

As a rule, these rights require that an accused should be given an adequate and proper opportunity to challenge and question a witness against him, either at the time the witness was making his statement or at some later stage of the proceedings.'

[13.23] Her Ladyship did not see anything in the relevant provisions of the 1999 Act which was inconsistent with these principles. The evidence is produced at the trial in the presence of the accused, some of it in pre-recorded form and some of it by contemporaneous television transmission. The accused can see and hear it all and has every opportunity to challenge and question the witnesses against him at the trial itself. The only thing missing is a face-to-face confrontation, but the appellants accepted that the Convention does not guarantee a right to face-to-face confrontation.

[13.24] With this concession, it is difficult to see how the argument that the measures are incompatible with art 6 could possibly have succeeded. Counsel for the appellants, however, sought to argue that the European case law should be seen in the light of the traditions of the domestic legal system and that the nature of the criminal proceedings in each contracting state affects the court's approach to the basic principle cited above that all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument. In our system this meant that the starting point is that all the evidence is given literally in the court room in front of the accused. Although it was conceded that this right to confrontation might have to yield in a given case where a child may not be able to give evidence satisfactorily in open court, the legislation excluded such individualised consideration. This raises an interesting question as to whether the European Court has applied different standards according to the traditions of each legal system (see Jackson 'The Effect of Human Rights on Criminal Evidentiary Processes' (2005) 68 MLR 737). It appears from the judgment of Lord Rodger of Earlsferry that counsel attempted to draw support for the argument being made from the right to confrontation in the Sixth Amendment to the US Constitution, which guarantees the defendant in a criminal trial the 'right to be confronted with the witnesses against him'. But as Lord Rodger made clear, whatever the merit of requiring that witnesses give evidence under the gaze of the accused, this line of thought has never given rise to a corresponding requirement in English law (see *R v Smellie* (1919) 14 Cr App R 128). Apart from the status of the right in English law, Lady Hale in any event considered that the Strasbourg court would not regard our domestic legal

system as so set in stone that Parliament would not be entitled to modify or adapt it to meet modern conditions, provided those adaptations complied with the essential requirements of art 6. In this case, the modification was simply the use of modern equipment to put the best evidence before the court while preserving the essential rights of the accused to know and challenge all the evidence against him.

[13.25] The special measures directions do not apply to defendants and the third line of argument was that it was unfair to the child defendants in the cases before their Lordships to deny them the same opportunity to give their evidence under the conditions which are now presumed to produce the best evidence for other child witnesses. But, as Lady Hale said, the fact that defendants are deprived of being able to invoke the special measures to enhance their testimony does not provide an argument for depriving the court of the best evidence available from other child witnesses. The question was what, if anything, a court needed to do to ensure that the defendant is not at a substantial disadvantage compared with the prosecution and any other defendants. Although defendants were excluded from the statutory scheme provided by the 1999 Act, the court had wide and flexible inherent powers to ensure that the accused received a fair trial and this included a fair opportunity to give the best evidence he could. Clearly, then, if there were steps which a court could take in the exercise of its inherent powers to assist defendants to give their best evidence, the 1999 Act did not exclude this. Her Ladyship even went on to question, without ruling, whether the decision in *R (on the application of S) v Waltham Forest Youth Court* [2004] EWHC 715 (Admin), [2004] All ER (D) 590 (Mar) was correct in holding that there was no inherent power to allow a defendant to give evidence by live link, as Parliament had provided exclusively for the circumstances when a live link might be used. Whether the courts had such a power was a question for another day. The fact that an accused may need assistance to give his best evidence, however, could not justify excluding the best evidence of others.

[13.26] Their Lordships were undoubtedly correct on this point but the cases, nevertheless, highlight the disadvantages under which child defendants labour where, for example, their ability to give their best evidence might be enhanced by the admission of a video recording taken while the evidence was fresh in their memory or where they are intimidated by the court atmosphere or by other witnesses or defendants. The courts may have inherent powers to assist defendants which extend to allowing them to give evidence by live link but there are currently no procedures available to enable them to make video recorded statements in chief. Lord Rodger in his judgment mentioned the fact that when the Vulnerable Witnesses (Scotland) Act 2004 comes into force, children who give evidence as accused persons will, for the most part, be treated in the same way as other children who are witnesses and this is surely the correct approach to take.

Witness training

[13.27] One of the advantages of a witness's evidence in chief being constituted by a video recording taken at a time when events are fresh in the witness's memory is that there is a record of events which can be preserved for trial before there has been any possibility of contamination. In *R v Momodou* [2005] EWCA Crim 177, [2005] 2 All ER 571 (see also [7.7], [10.4] above) a number of prosecution witnesses called at a trial arising out of a riot had been given witness training by their employers, Group 4. The Court of Appeal expressed its strong disapproval of any form of witness training conducted in the context of a forthcoming trial, saying that there was a dramatic distinction between witness training or coaching and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for the prosecution or defence) was not permitted. This was the logical consequence of the well-known principle that discussions between witnesses should not take place and that the statement of proofs of one witness should not be disclosed to any other. The witness should give his or her evidence, so far as practicable, uninfluenced by what anyone else had said, whether in formal discussions or in informal conversations. The risk inherent in witness training was that, even if it took place one to one, with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be improved. Although these dangers are present in one-to-one witness training, where the witness is jointly trained with other witnesses to the same event, the dangers dramatically increase.

[13.28] Although witness training was prohibited, however, the Court of Appeal considered that this did not preclude pre-trial arrangements to familiarise the witness with the layout of the court, the likely sequence of events when the witness is giving evidence and a balanced appraisal of the different responsibilities of the various participants. Sensible preparation of the witness which assists the witness to give of his or her best at the forthcoming trial was permissible. In the context of an anticipated trial, however, if arrangements were made for witness familiarisation by outside agencies, not routinely performed by or through the Witness Service, the Crown Prosecution Service should be informed in relation to prosecution witnesses and if the defence engages in the process counsel's advice should be sought. It is a matter of professional duty on counsel and solicitors to ensure that the trial judge is informed of any familiarisation process and the CPS made aware of what has happened.

Proceeds of crime

[13.29] In an important ruling this year the House of Lords in *R v Montila* [2005] UKHL 50, [2005] 1 All ER 113 clarified what the Crown needs to prove in money laundering offences under proceeds of crime legislation. In offences under the Drug Trafficking Act 1994 and the Criminal Justice Act 1988, it was provided that a person is guilty of an offence if he knowingly or having reasonable grounds to suspect that any property was 'another person's proceeds' of crime, conceals or disguises it, or converts it or transfers it or removes it from the jurisdiction for the purpose of assisting any person to avoid prosecution. The House of Lords clarified that in these offences it was necessary for the Crown to prove not only that the accused had the necessary knowledge or suspicion that the property being converted was the proceeds of drug trafficking or crime but also that the property was in fact the proceeds of drug trafficking or crime. Their Lordships also made it clear that there is no room for ambiguity in the new Proceeds of Crime Act 2002: the property that is being dealt with in each case must be shown to have been criminal property.

Extradition

I M YEATS, BCL, MA

Barrister, Senior Lecturer in Law, Queen Mary, University of London

[14.1] The Extradition Act 2003 was intended to simplify and expedite the process of securing the surrender of fugitive criminals. Fatmir Blea, however, successfully resisted two attempts by the government of Albania to secure his return there after he had been convicted in his absence of premeditated murder and illegal possession of military weapons and sentenced to 13 years' imprisonment. Albania is a category 2 country, to which the provisions of Pt 2 of the 2003 Act apply. The overall conclusion of these cases is that the courts, mindful of the purpose of the legislation, should interpret it purposively and should not be deterred by problems of translation or differences in terminology and of procedure between the UK and the requesting state, but must ensure that the rights of fugitives are respected.

[14.2] Blea was alleged, on a date in September 1998, while working as a security guard at a reservoir, to have killed a homeless man with a single shot to the head. He escaped from the scene and all efforts by the Albanian authorities to locate him failed. His own account was that he had come to the UK in November 1998 and had been there ever since. Crane J quashed the first certificate from the Secretary of State under s 70 of the 2003 Act following a request from the Albanian government (*R (on the application of Blea) v Secretary of State for the Home Department* [2004] EWHC 2034 (Admin), [2005] 1 All ER 810). Section 70(3) and (4) provide that a request is valid if it contains a statement that the accused 'is alleged to be unlawfully at large after conviction by a court in the category 2 territory of an offence specified in the request'. There was no explicit statement in the request that the claimant was *unlawfully* at large. The judge accepted that there did not have to be a statement adopting the exacting wording of s 70 and acknowledged that in a clear case a judge could conclude, in the absence of a statement by the requesting state, that the person was not only at large but was unlawfully at large. In the present case, however, it was unsafe to draw such a conclusion and it was not impossible that he was not unlawfully at large in the sense that he was liable to immediate arrest in Albania.

[14.3] A second request and certificate followed. It seems that an argument that the second certificate was an abuse of process was rejected by the district judge and was not pursued on appeal. The judge, however, discharged Blea and his decision was upheld by the Administrative Court (sub nom *Government of Albania v Blea* [2005] EWHC 475 (Admin))

[2005] 3 All ER 351). The Act sets out in detail the successive steps to be followed by the judge. In the case of a fugitive who has already been convicted in the requesting state these are contained in s 85, which provides:

‘(3) If the judge decides [that the person was not convicted in his presence] he must decide whether the person deliberately absented himself from his trial ...

(5) If the judge decides that question in the negative he must decide whether the person would be entitled to a retrial or (on appeal) to a review amounting to a retrial ...

(7) If the judge decides that question in the negative he must order the person’s discharge.’

The judge decided the question in (3) in the negative and, since the Albanian government conceded that the time for a possible appeal had elapsed, discharged Blea. Before the appeal was heard, the government introduced without objection fresh evidence to show that a retrial could still take place. The Administrative Court had therefore to consider both subsections (3) and (5). In relation to the latter, the court was not satisfied, making allowances for problems of translation and so forth, that the evidence coming late and in piecemeal fashion gave the necessary assurances that Blea was entitled to a retrial or an appeal having equivalent effect.

[14.4] The crucial issue was therefore the question in s 85(3). It was clear that criminal procedures varied so greatly that it was not possible to define what was meant by ‘deliberate absence’ or ‘trial’ and each case had to be considered on its distinctive facts. Parliament had chosen the word ‘trial’, rather than an expression such as ‘the legal process’, so that it was not enough that Blea had gone into hiding and/or fled from Albania to avoid any criminal investigation that might follow the events of September 1998. There were no domestic cases reported in which a trial had been permitted in the absence of the defendant in the present circumstances. For these reasons the decision to discharge Blea had been correct.

[14.5] In *Government of Germany v Kleinschmidt* [2005] EWHC 1373 (Admin) [2005] 3 All ER 759 at [52] Sedley LJ noted that: ‘The Extradition Act 2003 is throwing up a number of problems. The present one is not the only problem attributable to apparent haste in its composition.’ The Divisional Court was, however, keen to solve the problem and not to allow a technicality resulting from deficient drafting to defeat the legislative objective. Germany is a category 2 territory. The Secretary of State issued a certificate pursuant to s 70 of the 2003 Act. A provisional warrant was issued for the arrest of two individuals wanted in Germany for trial on charges of fraud. In such cases certain documents, including a copy of any relevant Order in Council, had to be received by

the judge within a period of 45 days (s 74(10)). At the initial stages of the extradition hearing the judge is required to decide, inter alia, whether copies of the documents sent to the judge by the Secretary of State have been served on the person whose extradition is requested. In fact, a copy of the Order in Council had not been served on them. The district judge therefore held that the obligation to serve the documents including the relevant Order in Council was that of the requesting state and not of the court and that it was mandatory that this be done before the proceedings began. He therefore discharged the respondents.

[14.6] The requirement that the Order in Council be served on the fugitive before the hearings was not found in the legislative regime in place before the 2003 Act. The strongest argument on their behalf was therefore that Parliament had intended a significant change and that to permit late service would be to deny the fugitive an intended benefit. The Divisional Court, however, declined to construe the Act so as to permit him to rely on a merely technical point. It would be sufficient if service of the documents took place at the hearing and, if necessary, an adjournment could be granted so that the effect of the document could be properly considered. It would normally be the Crown Prosecution Service, which in most cases acts for the requesting state and whose position is reinforced by s 190 of the 2003 Act, which would be responsible for the service of the documents on the respondents.

[14.7] Christopher Raffile appealed under s 103 of the Extradition Act 2003 against the decision of a district judge to send his case to the Secretary of State to await a decision on whether he was to be extradited to the United States (*Raffile v Government of the United States of America* [2004] EWHC 2913 (Admin), [2005] 1 All ER 889). In 1999 he had been sentenced to imprisonment for sexual offences, but the greater part of the sentence was suspended. He was released subject to supervision after a few months but was alleged to have violated the conditions of his liberty and had also been charged with larceny. He had, however, disappeared without facing trial and warrants had been issued for his arrest. He was arrested in England in 2004. The gist of his case was that he had experienced psychiatric problems that led to his being a suicide risk, that he had experienced these problems at the time of his original trial and that they had revived with the prospect of his being returned to the United States. His solicitor had apparently applied to the court for an adjournment of the hearing so that a psychiatric report could be obtained, but this application had not been received. When the hearing began, the judge followed the steps in the procedure set out in ss 75–92 of the 2003 Act. The relevant features of this procedure were as follows. Under s 76(5) if the extradition hearing does not begin on or before the date fixed and the person applies to the judge to be discharged, the judge must order his discharge. The judge interpreted this provision to mean that, since there had been no prior application to adjourn the hearing, he must discharge the person whose return was sought. He therefore said

that he had no power to agree to an adjournment made to the court at that point in the proceedings. He then followed the succession of stages prescribed in the statute. No submissions were made on any issue until he reached s 87, which required him to consider whether extradition would be compatible with Raffile's rights under the Human Rights Act 1998. At this point the request for an adjournment was renewed and the judge considered submissions that, in view of his mental illness, it would be a breach of arts 2 and 3 of the European Convention to order his return to the United States. The judge then gave reasons for not agreeing to the adjournment and held that Raffile's mental state was a matter to which the trial court would have to give attention and was not a bar to his surrender and that his mental condition had been properly managed during his earlier period of imprisonment. After the judge had reached his decision on s 87, counsel sought to address him on an issue arising under s 79(1)(c), namely that extradition was barred by lapse of time. The judge declined to consider this issue, as he was engaged on a staged process under the statute and he could not travel backwards to a stage already completed.

[14.8] The Divisional Court found fault with a number of elements of this approach, but did not reverse the decision. If the judge had intended to rule that he had no power to adjourn the proceedings, he was in error, because s 76(5) provided that the hearing had to begin on or before the prescribed date. The hearing could therefore start on the appropriate date but would have to be adjourned when an issue was reached which could not be dealt with immediately without unfairness. The judge had, in fact, subsequently given principled reasons for refusing the adjournment and his conclusion that the mental health problems were not a bar to an extradition but would be of concern to the court of trial was correct, even in the light of the psychiatrist's report available to the Divisional Court. Further, the refusal to reopen the issue of delay under s 79 was capable of leading to impropriety and injustice, if counsel through misunderstanding or neglect had failed to deal with the argument at the appropriate stage. The judge ought therefore to have considered the submissions but there was no merit in the substantive argument as to delay.

[14.9] In *Office of the King's Prosecutor, Brussels v Cando Armas* [2004] EWHC 2019 (Admin), [2005] 2 All ER 181 a Divisional Court considered argument as to the meaning of 'conduct' in s 65 of the Extradition Act 2003. This is not described in detail as it has been the subject of an appeal (now reported at [2005] UKHL 67, [2006] 1 All ER 647).

Family Law

JONATHAN HERRING, MC, BCL

Fellow in Law, Exeter College, University of Oxford

The right to marry

[15.1] *B v United Kingdom* (App no 36536/02) [2005] All E (D) 63 (Sep) concerned B (aged 54) who had divorced his wife and wished to marry his daughter-in-law (L, aged 44). The couple were cohabiting. This is permitted in English law, but only under restrictive circumstances. Section 1(5)(b) of the Marriage Act 1949 permits this only where 'in the case of a marriage between a man and the former wife of his son, after the death of both his son and the mother of his son'. In this case B and L's former partners were living. They claimed before the European Court of Human Rights that the prohibition of their marriage interfered with their right to marry under art 12 of the European Convention on Human Rights.

[15.2] The European Court accepted that art 12's right to marry was a fundamental right and that the law of contracting states should not restrict that right 'in such a way or to such an extent that the very essence of the right is impaired' (at [36]). The court accepted that the UK legislation was aimed at 'protecting the integrity of the family (preventing sexual rivalry between parents and children) and preventing harm to children who may be affected by the changing relationships of the adults around them' (at [37]). However, the court emphasised that the fact there was a bar on the marriage did not prevent the couple cohabiting. Any emotional insecurity or confusion felt by L's son (who was living with B and L) was caused by B and L's relationship and their marriage would not make things worse for him.

[15.3] A key factor for the court appears to be that there is a procedure under English law whereby couples barred from marriage under s 1(5)(b) can apply for a personal Act of Parliament. This is, of course, a costly procedure. The court took the view that the existence of this waiver indicated that there was no justification for an absolute bar. The parliamentary procedure was cumbersome and expensive and was not a 'practically accessible or effective mechanism for individuals to vindicate their rights' (at [50]). If the UK law allowed exceptions to the bar on 'parent/child in law' marriages the exceptions had to be open to everyone not just those rich enough to use them. The UK law therefore breached the couple's art 12 rights.

[15.4] The decision has raised the ire of at least one eminent critic. Stephen Cretney ('Marriage, Mothers in Law and Human Rights' (2005) LQR 8, p 10) has commented:

'A group of eminent jurists (one Andorran, one English, one Estonian, one Maltese, one Moldovan, one Polish and one Spanish) have thus effectively struck down a compromise, no doubt not wholly satisfactory but nonetheless an attempt to deal with real anxieties, accepted by the U.K. Parliament ... [I]t seems highly questionable whether the European Court of Human Rights is the appropriate body to take decisions on such matters in this way.'

[15.5] The approach of the European Court towards the question of who can marry is interesting. The approach did not focus on whether the relationship was of the kind which is worthy to be granted the privileges of marriage, but rather whether there were any good reasons to justify restricting access to the right to marry. This way of looking at the question may be significant when the court comes, as surely it will soon, to consider the question of whether same-sex couples have a right to marry.

Forced marriages

[15.6] The problem of forced marriages is one that is concerning both courts and the government. *Re SK (an adult) (forced marriage: appropriate relief)* [2004] EWHC 3202 (Fam), [2005] 3 All ER 421 concerned an application to Mr Justice Singer to use the inherent jurisdiction to protect an individual from an alleged forced marriage. The proposed claimant in the case (SK) knew nothing of the application brought on her behalf. The case concerned a young British citizen who was currently in Bangladesh, but had spent most of her life in Britain. Consular officers in Bangladesh received information suggesting that she was being kept by her relatives in Bangladesh against her wishes and planning to arrange a marriage for her against her wishes. There was evidence that her 'capacity to control her own life and destiny' (at [3]) was severely limited through threats and force.

[15.7] The first issue was whether or not the inherent jurisdiction could be invoked to assist SK. Singer J held that it could. It was well established that the jurisdiction could be used to protect those under the age of 18, and in recent years it had been used to protect those over the 18 who lacked mental capacity, through, for example, mental illness. Singer J held (at [8]) that:

'If an adult is deprived of the capacity to make relevant decisions, then if there is disagreement about what should be done in his or her best interests or if there is a serious issue as to the propriety of what is proposed, recourse can be had to the court for declaratory relief.'

Any decision would be made based on what is in the individual's 'best interests' (at [9]). Orders were made to enable the court to discover SK's true situation. These included that SK was ordered to contact the British High Commission in Bangladesh and her relatives were ordered to disclose the exact whereabouts of SK to her litigation friend. The relatives

were also ordered not to cause or permit SK to undergo a ceremony or purported ceremony of betrothal or marriage.

[15.8] The report of the decisions gives details of what happened next. Following the orders SK was interviewed by a British Consular Officer in Dhaka. She returned to this country and made it clear that she had no need of the court's protection. The proceedings were discontinued.

[15.9] The decision indicates the seriousness with which the courts will take allegations of alleged forced marriages. It also reveals the extent to which the inherent jurisdiction can be used to protect people whom it is feared are incapable of looking after themselves. But therein lies the rub. Surely we wish to protect those who are unable to look after themselves, but doing so in a way which does not interfere in competent individuals' private lives is not straightforward.

School uniforms and children's rights

[15.10] In *R (on the application of SB) v Governors of Denbigh High School* [2005] EWCA Civ 199, [2005] 2 All ER 396 SB brought an action complaining about her school's dress code. She wished to come to school dress in a jilbab. This was a form of dress which concealed the shape of her arms and legs. It was not permitted under the school dress code. The school did permit students to wear a shalwar kameeze. This was a sleeveless dress worn over a school shirt and with loose trousers which tapered at the ankle. The school also permitted the wearing of headscarves. SB was a Muslim and believed that although the shalwar kameeze was regarded as appropriate dress by some Muslims, it was inappropriate for her. She refused to attend school unless she was allowed to wear the jilbab and the school refused to allow her to attend unless she complied with the uniform code. SB applied for judicial review of the school's decision. She claimed that the uniform code had infringed her right to manifest her religion or belief, as protected by art 9(1) of the European Convention of Human Rights. The trial judge dismissed her application and she appealed to the Court of Appeal.

[15.11] The Court of Appeal held that her art 9 rights had been interfered with. The school was required to justify that interference. The school had started with an assumption that its uniform policy was correct and must be obeyed. Instead it should have considered whether there were good reasons why SB's right to manifest her religious belief should be interfered with. In other words, SB's rights should have been the starting point of their approach to the issue.

[15.12] For family lawyers there are two aspects of the decision which require attention. The first is the emphasis placed in the case on children's rights. This is particularly notable in the context of education, where the law protecting children's rights has been notably less developed than

elsewhere. Brooke LJ (at [76]) regarded the problem with the approach taken by the school being the following:

'Nobody who considered the issues on its behalf started from the premise that the claimant had a right which is recognised by English law, and that the onus lay on the school to justify its interference with that right. Instead, it started from the premise that its uniform policy was there to be obeyed: if the claimant did not like it, she could go to a different school.'

[15.13] The second is the weighing up of the different interests. Here the case could be regarded as one that involved the weighing up of one pupil's right to wear a certain kind of clothing based on religious grounds and the interests of other pupils at the school. In particular, the concern that some pupils may feel pressurised into wearing the jilbab if they are to be regarded as 'proper Muslims'.

[15.14] It is important to emphasise that the Court of Appeal were not saying that the school uniform policy was unlawful. Rather, the decision to exclude her from school and to retain the dress code had been made in the wrong way. Brooke LJ (at [81]) listed some of the factors to be considered by a school in deciding whether to restrict pupil's religious-based clothing decisions:

'(i) whether the members of any further religious groups (other than very strict Muslims) might wish to be free to manifest their religion or beliefs by wearing clothing not currently permitted by the school's uniform policy, and the effect that a larger variety of different clothes being worn by students for religious reasons would have on the school's policy of inclusiveness; (ii) whether it is appropriate to override the beliefs of very strict Muslims given that liberal Muslims have been permitted the dress code of their choice and the school's uniform policy is not entirely secular; (iii) whether it is appropriate to take into account any, and if so which, of the concerns expressed by the school's three witnesses as good reasons for depriving a student like the claimant of her right to manifest her beliefs by the clothing she wears at school, and the weight which should be accorded to each of these concerns; (iv) whether there is any way in which the school can do more to reconcile its wish to retain something resembling its current uniform policy with the beliefs of those like the claimant who consider that it exposes more of their bodies than they are permitted by their beliefs to show.'

He made it clear that it would be quite possible that taking these factors into account a school may legitimately decide to adopt a policy identical to that adopted by the Denbigh school in this case.

Child support and children's rights

[15.15] This year it was widely reported in the press that the Child Support Agency (CSA) has written off more than £1bn in unpaid child support payments. It is a sign of the times that this was generally interpreted as indicating the inefficiency of the agency, rather than a reason for shame for those many non-resident parents who were failing to support their children financially. But it was not just in the press that the

agency has faced challenges. Their behaviour was challenged in the House of Lords in *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2005] 4 All ER 905.

[15.16] Ms Kehoe applied to the CSA under s 4 of the Child Support Act 1991 for a maintenance assessment to be made against her former husband in connection with her four children. Her application was made in 1993, but the assessment was not made until 1995. The difficulties continued, with arrears accumulating following unsuccessful attempts at enforcement by the agency. By 2003 the amount owing was £17,000. The applicant left England for Spain and the CSA closed its file. Ms Kehoe instituted proceedings against the Secretary of State for Work and Pensions. She claimed, first, that the agency delays in assessing and enforcing the payments infringed her rights under art 6 and art 7 of the European Convention on Human Rights, as protected by the Human Rights Act 1998. Secondly, that s 8 of the Child Support Act 1991 (which prevented the court making orders in connection with child maintenance when the CSA was dealing with the children) infringed her rights under art 6 to a fair trial. This was because it denied a resident parent access to courts in connection with problems in receiving financial support from the non-resident parent.

[15.17] The majority of their Lordships held that the Child Support Act 1991 deliberately gave a parent with care no right to recover or enforce maintenance, subject to certain exceptions in s 8 which did not apply here. Article 6 of the Convention was not engaged because that concerned safeguarding legal rights which existed under national law. As the applicant had no rights under national law to enforce child support payments, she could not complain about the inability to enforce those payments relying on art 6.

[15.18] A key element in their Lordships' reasoning was that Mrs Kehoe had no legal right to child maintenance. Lord Bingham held that this lack of legal right for caring parents to enforce maintenance payments was an 'essential' aspect of the Child Support Scheme set out in the 1991 Act (at [5]). Lord Hope (at [33]) put it this way:

'The Act uses the word "duty" in s 1(3), where it refers to the duty of the absent parent with respect to whom the assessment was made to make the payments, and the word "obligation" in s 4(2)(b), where it refers to the enforcement of the obligation to pay child support maintenance in accordance with the assessment. But nowhere in the Act is it said that the absent parent owes a duty, or is under an obligation, to pay that amount to the person with care. Nor is it said anywhere that the person with care has a right which she can enforce against the absent parent.'

Lord Bingham made it clear that it was not for the House of Lords to decide whether this policy was a sensible one for the legislature to adopt. As Lord Walker (at [45]) pointed out, a caring parent had some rights in

law. If the CSA were illegally to use or fail to use its powers then an action for judicial review could be brought.

[15.19] In powerful dissenting speech Baroness Hale (at [49]) laid her cards on the table with her opening sentence: 'My Lords, this is another case which has been presented to us largely as a case about adults' rights when in reality it is a case about children's rights.' She emphasised that it has long been accepted that children who are too young to fend for themselves have to be provided for by their parents. She was adamant that the Child Support Act 1991 does not represent the totality of parents' obligations to support their children. As she pointed out, s 78(6) of the Social Security Administration Act 1992 still retains an obligation on parents to maintain their child. Indeed, s 8 of the Child Support Act itself does not prevent the courts making further orders in respect of children outside the aegis of the Child Support Act, for example, where the child is disabled (s 8(8)); or to make property adjustment of lump sum orders under, for example, the Children Act 1989, Sch 1. She argued that the 1991 Act represents the minimum a child should receive but is not the limit of the rights available (para 70). This enabled her to hold that a child has a right to be maintained by their parents which exists independently of the 1991 Act. Such a right therefore engages with art 6. Article 6 therefore required an effective way for the enforcement of the child's right. The Child Support Act 1991, in not providing an effective mechanism of enforcing adequate support failed to adequately protect the child's right under art 6. Although there was the option (which Lord Walker had mentioned) of judicial review, this was an inadequate protection of a child's rights.

[15.20] The difference between the majority and minority approaches is striking. Most notable is the emphasis on the rights of the child which is at the heart of Baroness Hale's judgment. For the majority the focus is on the right of the caring parent. Indeed the majority approach is notable for its absence of a detailed examination of the issue from the point of view of the child's rights.

[15.21] There are indications that the government is considering reform of the Child Support Act 1991. As this case demonstrates, while fathers' groups, the government and the CSA continue to struggle and fight over the issue of child support children go without adequate financial support.

Child abduction and child welfare

[15.22] One of the principles underpinning the law on child abduction is that a dispute over the residence of children should be heard in the country in which the child is habitually resident. So if a child is removed from another country and brought to England, the English courts will normally order the return of the child to her home country, so that her home courts can resolve the dispute. This principle is enshrined in the Hague Convention, but is applied even in cases which involve countries

which are not signatories to it. Normally, the principle is uncontroversial. Problems arise where the country to which the children are to be returned is one which relies on different legal principles to resolve family cases than those familiar to the English courts. This was the issue before the House of Lords in *Re J (a child) (return to foreign jurisdiction: convention rights)* [2005] UKHL 40, [2005] 3 All ER 291.

[15.23] The child's father was Saudi Arabian. The mother had both British and Saudi nationality. The couple were married according to Shariah law in Saudi Arabia. After two years of marriage a child was born and shortly after the birth the mother obtained a divorce under Shariah law. One of the terms of the divorce agreement was that the mother was not permitted to remove the child from Saudi Arabia without the consent of the father. The couple then remarried under Shariah law. A few months after the remarriage, the mother took the children to the UK with the consent of the father. The mother petitioned for divorce in the English courts. The father sought a specific issue order under s 8 of the Children Act 1989, demanding the return of the children to Saudi Arabia. Saudi Arabia is not a party to the Hague Convention and so the case did not fall under the regulations provided there. The trial judge held that he would have ordered the children to return but for the fact that the husband had alleged that the wife had been unfaithful to him. The judge's concern was that, under Shariah law, allegations of adultery can have a significant impact on residence cases. The Court of Appeal allowed the father's appeal on the basis that the concerns over the way that Shariah law might impact on the welfare of the child had been given too much weight.

[15.24] The House of Lords emphasised that where the trial judge has correctly directed herself on the law, then only where her decision was so plainly wrong that she had given too much weight to a particular factor should her decision be overruled. Appeal courts should not overturn decisions of trial judges simply because they do not agree with the decision reached.

[15.25] Their Lordships emphasised that, in any case concerning the upbringing of a child, the welfare of the child was the court's paramount consideration, be the application under the Children Act or the inherent jurisdiction. This welfare principle applied to cases of child abduction which involved countries which were not signatories to the Hague Convention. Baroness Hale explicitly rejected an argument that in such cases there would be a strong presumption that children should be returned to their country of habitual residence. She did, however, think (at [32]) that:

'the judge may find it convenient to start from the proposition that it is likely to be better for a child to return to his home country for any disputes about his future to be decided there. A case against his doing so has to be made. But the weight to be given to that proposition will vary enormously from case to case.'

[15.26] Factors that could be relevant in assessing whether a child should be returned include the degree of connection of the child with each country. Baroness Hale explained (at [33]) that the notion of connection here is broader than the concept of habitual residence. In particular attention will be paid to the length of time a child has spent in each country. Attention would also be paid to who could be regarded as the primary carer of the child and the effect upon them of having the case heard here or overseas. Baroness Hale also accepted that it was relevant to consider whether the law in the country to which the child was to be sent worked in a way which would be described as discriminatory by our courts.

[15.27] In this case the trial judge had indeed focused on the welfare of the individual child. In this case the differences in the legal systems between England and Saudi Arabia were clearly important in an assessment of the child's welfare. In particular, the judge was entitled to take into account the fact that under the Saudi legal system, the mother would not be permitted to take the child to the UK without the father's permission. The judge's decision should not, therefore, be interfered with and the child would not therefore be returned to Saudi Arabia.

Disputes over medical treatment

[15.28] 2004 and 2005 have seen a series of applications by the parents of Charlotte Wyatt being heard by courts relating to their daughter's treatment in hospital (the *Charlotte Wyatt* litigation: *Wyatt v Portsmouth Hospital NHS* [2004] EWHC 2247 (Fam), [2004] All ER (D) 89 (Oct); [2005] EWHC 117 (Fam), [2005] All ER (D) 294 (Jan); [2005] EWHC 693 (Fam), [2005] All ER (D) 278 (Apr); *Wyatt (a child) (medical treatment: continuation of order)* [2005] EWHC 2293 (Fam), [2005] 4 All ER 1325; [2005] EWCA Civ 1181, [2005] All ER (D) 107 (Oct)). Charlotte Wyatt was born on 20 October 2003 prematurely at 26 weeks gestation and weighing 458g. Ever since her birth she has been ill and has never left hospital. There had been ongoing disagreements between her parents and the medical team treating her over proposals for her treatment. A key dispute concerned the extent to which the medical team should attempt to provide ventilation to Charlotte if she were to suffer a major health crisis, requiring such life-saving intervention. In essence, the views of the doctors have been that in the event of a major crisis ventilation should not be offered, while her parents have wanted everything done to save her. The medical team have expressed concern that ventilation might kill Charlotte and, even if it was provided, it might not improve her condition. These disputes have led to a number of hearings. It is not possible here to consider all the issues raised, but there are a number of key points that can be brought out.

[15.29] First, as is well known, in deciding a dispute over a child the court's paramount consideration is the welfare of the child. In

summarising their approach to the welfare of the child in cases of this kind the Court of Appeal ([2005] All ER (D) 107 (Oct) at [87]) stated:

‘In our judgment, the intellectual milestones for the judge in a case such as the present are, therefore, simple, although the ultimate decision will frequently be extremely difficult. The judge must decide what is in the child’s best interests. In making that decision, the welfare of the child is paramount, and the judge must look at the question from the assumed point of view of the patient (*Re J*). There is a strong presumption in favour of a course of action which will prolong life, but that presumption is not irrebuttable (*Re J*). The term “best interests” encompasses medical, emotional, and all other welfare issues (*Re A*). The court must conduct a balancing exercise in which all the relevant factors are weighed (*Re J*) and a helpful way of undertaking this exercise is to draw up a balance sheet (*Re A*).’

[15.30] Second, the Court of Appeal ([2005] All ER (D) 107 (Oct) at [76]) rejected an argument that, in cases of withdrawing or not offering treatment to seriously ill children, the key question was whether or not the child’s condition after the treatment would be intolerable. The court held that the test was simply what was in the child’s best interests. Although asking whether, if the treatment were provided, life would be intolerable might be a valuable guide, it did not replace the best interests test.

[15.31] Third, it is notable that in assessing Charlotte’s best interests, the courts have placed weight on the way she might die ([2004] All ER (D) 89 (Oct) at [28]). The Court of Appeal ([2005] All ER (D) 107 (Oct) at [77]) emphasised that, when considering best interests, the courts are not limited to only considering medical issues, but can consider emotional and other factors. Hedley J ([2005] All ER (D) 278 (Apr) at [16]) held that it would not be in Charlotte’s best interests to die in the course of futile aggressive treatment. Rather it would be in her interests to die with dignity in the loving arms of her parents.

[15.32] Fourth, one of the notable features of this case has been that the gloomy predictions of the doctors have proved unfounded. In a hearing of 8 October 2004 it was said that her prognosis was not good and she was not expected to survive the winter. But she did. Of course, this does not mean that medical opinion in cases of this kind should be regarded as unreliable. It does emphasise that medical predictions of this kind are just that – predictions – and cannot be taken as statements of fact. At least one commentator discussing this litigation has pointed out that in this case parental instinct that Charlotte would do well has proved more reliable than expert opinion (M Brazier ‘An intractable dispute: When parents and professionals disagree’ (2005) 13 Medical Law Review 412).

[15.33] Finally, in the latest hearing, Hedley J ([2005] 4 All ER 1325) has made it clear that it would be wrong of the court to order a doctor to treat a patient in a way which was contrary to her conscience. So, although a doctor, in deciding how to treat Charlotte, will place weight on

the parents' views, this must not be to the extent of her acting in a way which was an affront to her conscience.

[15.34] This litigation has demonstrated the real difficulties in dealing with cases involving sick children. Parents, naturally, seek to cling on to any hope that their child's condition will improve. Doctors will want to balance any hope against the likely success of any treatment and the danger that it might prove to be futile. And, although no one likes this to be made too explicit, there is the whole issue of cost on the NHS.

Parents' right and corporal punishment

[15.35] *R (on the application of Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15, [2005] 2 All ER 1 was a case was brought by claimants who were parents who sent their children private schools which claimed to be based on biblical observance. Part of the schools' regime involved the use of corporal punishment. This was said to be an aspect of their Christian beliefs. In some schools it was administered by teachers and in others by parents. Section 548 of the Education Act 1996 meant that it was unlawful for teachers to administer corporal punishment to their pupils.

[15.36] The claimants said that this provision interfered with their rights under art 9 of the European Convention on Human Rights, which protects the rights to manifest their religion or beliefs. This article was protected in English law under the Human Rights Act 1998. They also sought to rely on art 2 of the First Protocol to the European Convention, which protected a right to education in conformity with religious conviction and art 8 of the Convention which protected the right to respect for their family life. The claimants sought from the courts a declaration that s 548 did not prevent a parent delegating to a teacher in an independent school to right to administer corporal punishment. The claim was dismissed by the trial judge, who held that the belief of the claimants in relation to corporal punishment were not religious beliefs for the purposes of European Convention. The Court of Appeal held that even if the belief in the benefits of the punishment were religious beliefs, it could not be said that it was a manifestation of that belief that teachers administer the punishment.

[15.37] The House of Lords held, that when considering art 9, it was important to appreciate that there was an absolute right to hold a belief, whether that was a religious belief or any other kind of belief. However, the right to manifest that belief was a qualified right. In deciding whether a belief was a genuine one, it would not be appropriate for a court to conduct an enquiry into whether or not the belief was a valid one, but rather the key question was whether the belief was honestly held and not capricious or fictitious. It was not, therefore, for the courts to decide whether the biblical texts referred to by the claimants did or did not support corporal punishment. It was enough that the claimants genuinely

believed they did. In this case the parents believed that corporal punishment was permissible if it was of a 'mild nature' such as a smack, and did not harm the child's physical and moral integrity. This belief was manifested by the parents' choice of sending their children to a school which used corporal punishment. Article 9 and art 2 of the First Protocol were both therefore engaged, and the parents' rights under these articles were interfered with by s 548. However, that interference was justifiable in order to protect the rights and freedom of children. Parliament was entitled to guide public opinion and entitled to decide a universal ban on the use of corporal punishment in schools was justifiable in the best interests of children as a group.

[15.38] Of course, this case raises a variety of issues. For family lawyers the main interest lies in the attitude of the House of Lords towards corporal punishment. Opponents of corporal punishment have claimed that the use of corporal punishment is an improper interference with children's rights. Lord Nicholls denied this (at [27]). He argued:

'Not every act of corporal punishment will adversely affect a child's physical and moral integrity to an extent sufficient to constitute a violation of [arts 3 and 8]. This being so, it is difficult to see how all corporal punishment of children, however mildly administered, is of its nature so contrary to a child's integrity that a belief in its infliction is necessarily excluded from the protection of art 9.'

He was not even willing to accept that 'smacking' by teachers involved an institutionalised and formalised form of punishment that necessarily infringed children's rights under art 3 or art 8. He concluded, however, that, as indicated above, it was legitimate for the government to conclude that the interests of all children justified the bar on corporal punishment in schools. His speech, however, is hardly a vindication of children's rights to protection. The interests of children come in a reason for interfering with the rights of adults, rather than being regarded as rights with their own independent weight. Although he does not say so explicitly, it appears he would have held lawful legislation that permitted 'mild' corporal punishment in schools.

[15.39] This might be contrasted with the opening of the speech of Baroness Hale (at [71]):

'My Lords, this is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no one here or in the courts below to speak on behalf of the children. No litigation friend has been appointed to consider the rights of the pupils involved separately from those of the adults ... The battle has been fought on ground selected by the adults.'

She went on to refer to the United Nations Convention on the Rights of the Child and the reports of the United Nations Committee on the Rights of the Child, which had been concerned about the position of corporal

punishment within schools and indeed within the family in a report pre-dating the implementation of s 548. She then asked (at [84]):

'How can it not be a legitimate and proportionate limitation on the practice of parents' religious beliefs to heed such a recommendation from the bodies charged with monitoring our compliance with the obligations which we have undertaken to respect the dignity of the individual and the rights of children?'

She concluded (at [86]):

'If a child has a right to be brought up without institutional violence, as he does, that right should be respected whether or not his parents and teachers believe otherwise.'

[15.40] It would be wrong to suggest that Baroness Hale in her speech advocates a complete ban on corporal punishment. Indeed, she acknowledges that the issue of banning corporal punishment within the family home raises complex issues (at [84]). She also notes that whether corporal punishment is beneficial is controversial issue. In the following passage (at [72]), the signs are that she would not advocate such a ban and may even believe such a ban to be incompatible with the European Convention on Human Rights:

'Children have the right to be properly cared for and brought up so that they can fulfil their potential and play their part in society. Their parents have both the primary responsibility and the primary right to do this. The state steps in to regulate the exercise of that responsibility in the interests of children and society as a whole. But "the child is not the child of the state" and it is important in a free society that parents should be allowed a large measure of autonomy in the way in which they discharge their parental responsibilities. A free society is premised on the fact that people are different from one another. A free society respects individual differences.'

Of course, the key issue is whether or not the use of corporal punishment should be regarded an issue which falls within the autonomy parents have to raise their children as they think fit. That is a question upon which views will differ and with which, no doubt, Parliament and courts will have to grapple again in the future. (See also [1.61] above.)

Paternity in cases of assisted conception

[15.41] *Re R (a child)* [2005] UKHL 33, [2005] 4 All ER 433 concerned the question of how paternity was ascertained in cases of assisted reproduction. D and her partner B sought IVF treatment from a licence clinic. They were approved by the clinic for treatment using eggs from D and sperm from a donor. Both D and B signed a form consenting to the treatment. In the form B acknowledged that he would be regarded as the father of any child born as a result of the treatment. After the treatment commenced, but before any embryos were successfully implanted, D and B separated. D did not inform the clinic of this but continued having treatment and embryos were implanted, which led to the birth of R. B

applied for a declaration that he was R's father. Hedley J at first instance declared he was, but the Court of Appeal allowed the appeal by D.

[15.42] Before the House of Lords it was argued that B was R's father by virtue of s 28(3) of the Human Fertilisation and Embryology Act 1990. Section 28(3) provides that if 'the embryo or the sperm and eggs were placed in the woman, or she was artificially inseminated, in the course of treatment services provided for her and a man together by a person to whom a licence applies', then the man can be treated as the father of the child.

[15.43] The key issue for their Lordships was the point in time when it had to be shown that the couple were receiving treatment services together for the purposes of sub-s (3): when the embryo was implanted, or at the time they were approved for treatment? The House of Lords unanimously held that the crucial time was when the embryos were implanted. At that point in time B was not receiving treatment services with the mother and therefore he could not be regarded as the father.

[15.44] Their reasoning for this interpretation was essentially pragmatic. To regard B as the father would be a fiction, Lord Hope suggested. It was true that the clinic believed that the treatment was still being offered to the couple but that was only because of the couple's deception in failing to inform the clinic about the change in their relationship. Whether the couple were receiving treatment services together was a question of fact. The perspective of the clinic was a factor to be taken into account, as was the perspective of the clients. It must be admitted that leaves the law in a somewhat uncertain state. Neither the perspective of the clinic nor that of the couple tells us whether the couple are receiving treatment services together, but rather a combination of the two. There is little guidance as to what to do if the two perspectives differ, except that in this particular case the greater weight was placed on the view of the couple.

[15.45] Their Lordships also gave some helpful guidance on the meaning of the term 'receiving treatment services together'. This, Lord Hope suggested, required that the couple were seeking treatment as part of a 'joint enterprise', in that they 'both wish to receive the benefit of the treatment to bring a child into being jointly as their child' (at [11]). It is not enough for the man simply to have consented to being regarded as the father (at [14]). The term did not require that the man receive direct physical treatment himself.

[15.46] Many commentators will welcome an approach to interpreting the Human Fertilisation and Embryology Act 1990 which produces practical and workable solutions as to paternity. But there are some issues of concern here. First, under s 13 of the Act:

'A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the

treatment (including the need of that child for a father), and of any other child who may be affected by the birth.’

The requirement of the clinic to consider the welfare of the child will involve a consideration of the child’s father. Here the clinic must have assessed D and B together and decided that they were appropriate to receive treatment services. The clinic was led to believe that D and B were still together at the time when the successful embryos were implanted. This deception deprived the clinic of the opportunity to assess whether D alone would be suitable to receive treatment. The clinic may well have decided she would, and indeed some commentators are critical of any assessment of potential parents by clinics. But, given the statutory framework, there may be some concerns that a client can ‘get around’ the licensing of treatment by being approved of together with a partner and then receive the treatment without the partner and that partner having no role in the child’s life.

[15.47] Secondly, there may be concerns from B’s point of view. It is possible that a man suffering infertility with his partner will undergo quite a degree of expense, invasive treatment and inconvenience before receiving treatment services with her. If she can choose to end the relationship and then continue receiving the treatment, and thereby so easily prevent his parental status arising this may be regarded as unfair. Is this a reflection of the view that fathers are easily dispensable?

Ancillary relief and the short marriage

[15.48] Few cases on ancillary relief have received such opprobrium from academics and practitioners as *Miller v Miller* [2005] EWCA Civ 984, [2005] All ER (D) 467 (Jul). The couple had started a relationship in 1995 but married in July 2000. At the time of marriage the wife was earning £85,000 per annum and the husband over £1m. The husband was worth over £20 million by the date of the divorce. Shortly after the marriage the wife gave up her job. She suffered a miscarriage in August 2002. The marriage broke down in April 2003 when the husband left the wife for another woman.

[15.49] At the trial the husband’s submission was that, given the shortness of the marriage, the wife should be returned to her financial position prior to the marriage. This, he suggested, could be met by offering her £500,000 to purchase a flat and £360,000 to cover three years of income shortfall until she worked back up to her previous employment status. The trial judge (Singer J) awarded the wife a house (worth £2.3m) and assets of £2.7m, providing in total £5m. The husband appealed in part because the trial judge had placed weight on the fact that he regarded the husband as being to blame for the cause of the breakdown; further, that the judge had failed to take into account the shortness of the marriage.

[15.50] The Court of Appeal upheld the first instance decision. First, the court emphasised that cases involving ancillary relief provide judges with a ‘generous ambit of discretion’ (at [2]) and that the Court of Appeal could only interfere if the assessment of the judge’s award fell outside that ambit. Thorpe LJ concluded that he himself would not have awarded as high a sum as Singer J had, but that the award could not be labelled as plainly excessive but rather lay at the ‘top end of the permissible bracket’ (at [55]).

[15.51] As regards the weight placed on the husband’s responsibility for ending the marriage, Thorpe LJ emphasised that courts are required in exercising their discretion under s 25 of the Matrimonial Causes Act to consider ‘all the circumstances of the case’. Although s 25(2)(g) specifically referred to conduct that it was inequitable to disregard, that did not mean that conduct which was not sufficiently serious to fall within sub-s (g) could not be taken into account. Thorpe LJ went on to hold (at [31]):

‘Having seen and heard the parties extensively cross-examined [Singer J] was plainly entitled to conclude that the husband was to blame for the breakdown of the marriage. That finding entitled him to give much less weight to the duration of the marriage than he would have done had he found that the wife was to blame for its breakdown or that the parties had separated consensually each acknowledging unexpected incompatibility.’

Wall J appeared slightly less certain about the emphasis on blame, although he thought it could be appropriate in ‘a tiny handful of cases where the marriage is short and childless and where the assets are substantial’ (at [65]). It is not made clear why blame is only relevant in these cases.

[15.52] The court then went on to consider the relevance of the length of the marriage. Here Thorpe LJ rejected the argument that it should be assumed that short marriage merited a low award. He argued that ‘what a party has given to a marriage and what a party has lost on its failure cannot be measured simply by counting the days of its duration’ (at [33]). He explained that under s 25 the court may need to take into account the ‘emotional and psychological damage’ caused by the marriage and its breakdown and the ‘extent to which the applicant’s future capacity and opportunity to enter into a fulfilling family life has been blighted’. In that regard it might be worth noting that the wife was 25 when she first met the husband and at the time of the hearing was 36. Wall J, in a concurring judgment, referred to a comment of Hale LJ’s in *Foster v Foster* [2003] EWCA Civ 565, [2003] All ER (D) 302 (Apr) that where ‘a substantial surplus had been generated by their joint efforts, it could not matter whether they had taken a short or a long time to do so’ (at [72]). Wall J held (at [76]) that to limit the wife’s case to enable her to be sufficiently economically independent to ‘stand on her own feet’ would be discriminatory.

[15.53] A further factor influencing the court was the wife's 'legitimate expectation' that after marriage her life would never again be at the level it was before the marriage. This factor referred to by Singer J ([2005] EWHC 528 (Fam) at [65]) was said by Thorpe LJ could be taken into account as a 'key element' in the award.

[15.54] Another issue of relevance was the weight to be attached to the years of relationship prior to the marriage. Between 1995 and July 1999 the couple were in an intimate relationship, but not cohabiting. Thorpe LJ said that with this in mind it would not be accurate to characterise this relationship as simply a marriage of two-and-three-quarter years of marriage. Rather 'at the age of 26 the applicant committed herself to this man' (at [53]).

[15.55] As already indicated, the judgment has met with fierce criticism. John Eekelaar has written an article on the case entitled 'The Descent into Chaos' [2005] Family Law 870. In respect to comments about fault, he argues that it is not the job of the courts to penalise people who cause the break-up of a marriage. There is, however, something to be said for the Court of Appeal's judgment. Some economists have warned of the danger that in the early years of a marriage (especially one in which the parties undertake traditional roles) a man benefits, while the benefits for the wife come later on. This creates the danger that a husband might leave the marriage early. As it has been explained (L Cohen 'Marriage and the Long-Term Contract' in A Dnes and R Rowthorn (eds) *The Law and Economics of Marriage and Divorce* (2002) p 230):

'At the formation, the marriage contract promises gains to both parties. Yet the period of time over which these gains are realized is not symmetrical. As a rule, men obtain gains early in the relationship, and women late ... The creation of this long-term imbalance provides the opportunity for strategic behaviour whereby one of the parties, generally the man, will perform his obligations under the marriage contract only so long as he is receiving a net positive marginal benefit and will breach the contract unless otherwise constrained once the marginal benefit falls below his opportunity cost.'

This leads to an argument there need to be a financial deterrent to men who may otherwise be tempted to leave the marriage early on. Whether such financial deterrents have any effect on people's decisions to divorce is debatable. The Court of Appeal appear to have been less persuaded by such economic ideas than the argument that the wife had given her husband 'the best years of her life'; he had left her for another woman after just two years of marriage; and that therefore he should pay. That may not appeal to many academics but it might resonate with a large section of the general public.

Land Law and Trusts

P J CLARKE, BCL, MA

Fellow and Tutor in Law, Jesus College, Oxford

Village greens

[16.1] The issue of rights over village greens has recently been considered by the House of Lords in *R v Oxfordshire County Council, ex p Sunningwell Parish Council* [1999] 3 All ER 385 (All ER Rev 1999, pp 223–225) and in *R (on the application of Beresford) v Sunderland City Council* [2003] UKHL 60, [2004] 1 All ER 160 (All ER Rev 2004 at [16.6]). Another issue has arisen in *Oxfordshire County Council v Oxford City Council* [2005] EWCA Civ 175, [2005] 3 All ER 961. In this case, the Court of Appeal had to consider the definition of a village green: the land in question was ‘Trap Grounds’ in North Oxford (the possible origins of the name are set out at [2]). Chadwick LJ, in a long and analytical judgment, considered the impact of s 22 of the amended Commons Registration Act 1965. The original s 22 included land on which the inhabitants of any locality had indulged in lawful sports and pastimes as of right for not less than 20 years. However, in 2000, by s 98 of the Countryside and Rights of Way Act 2000, s 22 was amended by providing that it was sufficient if the use of the land was by ‘a significant number of inhabitants’ from a ‘neighbourhood’, and they continued so to use the land (there is a reference to a prescribed period, which is not here material; no such period has yet been prescribed by regulation) up to the date of registration. The commentary in *Current Law Statutes* by Professor Stephen Tromans treated this amendment as entirely beneficial, as it would make registration easier.

[16.2] This category of village greens (referred to in the case itself as ‘class c greens’) had been created by the Commons Registration Act, unlike the other categories: land allotted under statute for the leisure or recreation of the inhabitants of any locality; and land on which the inhabitants of any locality had a customary right to indulge in lawful sports and pastimes. This was made clear by Lord Hoffmann in the *Sunningwell* case [1999] 3 All ER 385 at 397: there was no need for any claim of right. As a result, where there has been registration of a class c green, the register reveals on its face that there can no longer be any historic rights, as there is nothing in the 1965 Act to create them (at [81]). The amendment made by the 2000 Act required the use to be up to the date of the registration; therefore, if there was no registration, there could be no rights. This implied that a landowner could take action to prevent registration, and thus prevent what might otherwise be qualifying use

from arising (indeed, this is what Oxford City Council had done in the present case); this was justifiable as giving the landowner a last opportunity to enforce his rights; moreover, there was no issue as to retrospectivity: as no rights had been acquired, there could be nothing wrong in preventing the acquisition of such rights from taking place (at [94]–[96]).

[16.3] The above note is brief, and does not do full justice to the complexity of the issues, to Chadwick LJ's carefully analysis of them, or to the broader issues of claimed public rights over land, or the impact of the Human Rights legislation. Piecemeal reform and judicial decision have not resulted in a coherent system of registration and protection; and (whilst the matter may be beyond the House of Lords in its judicial capacity to resolve in a broad, and principled, way) it is hoped that Parliament (whilst bearing in mind the importance of art 1 of the First Protocol to the European Convention of Human Rights) will produce legislation which both benefits the public and yet provides protection (or compensation) for landowners whose assets are being used – or taken – for the public good. Leave to appeal to the House of Lords has been given. Further, the Commons Bill currently before Parliament seeks to reverse the Court of Appeal's interpretation of 'continuous use', requiring the use to be continuous only to the date of application for registration, rather than to the date of registration itself. This change would make a substantial difference; it would, in effect, reverse the result of decisions such as the *Oxford City* case itself.

Adverse possession and human rights

[16.4] *Beaulane Properties Ltd v Palmer* [2005] EWHC 1071 (Ch), [2005] 4 All ER 461 (A Cloherty and D Fox [2005] CLJ 558; M Dixon [2005] Conv 345) provides a full and learned exposition of the history of adverse possession, and also decides that the effect of the Land Registration Act 1925, s 75 and the Limitation Act 1980, taken together, was to deprive the owner of the paper title of his title, without compensation, and was thus contrary to art 1 of the First Protocol to the European Convention of Human Rights.

[16.5] By way of background and introduction, *J A Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2002] 3 All ER 865 (All ER Rev 2002 at [16.1] [16.5]) held that where a squatter had occupied land of a paper-title holder, all that the squatter had to do was to show an intention to possess the land; there was no requirement that the possessor had to intend to exclude the paper-title holder. The uncommunicated intention of the holder of the paper title was irrelevant: cf *Leigh v Jack* (1879) 5 Ex D 264, per Bramwell LJ. The land in *Pye* appears to have been of unregistered title.

[16.6] The facts of *Pye* were that, before 1999, Graham had occupied the land for 12 years. The Human Rights Act 1998 was thus not relevant,

as any rights that Graham had accrued (or that Pye had lost) were acquired or lost before the Act took effect on 2 October 2000.

[16.7] However, Pye appealed to the European Court of Human Rights, where its appeal was successful: [2005] ECHR 44202/02 (S Murch (2005) 155 NLJ 1912). The Limitation Act 1980 barred not only the paper-title holder's right to sue, but deprived him of his interest in the land, without compensation. Although a 12-year period was relatively long for the paper-title holder to make a claim, if he failed to do so the result was drastic: he lost his title without compensation. It was irrelevant that another individual – rather than the state – benefitted. The European Court of Human Rights emphasised that it was important that the landowner was not warned of the possibility of losing his title (an argument that any landowner took property with the knowledge that his title might be lost by virtue of adverse possession was also rejected by the court) and thus mere inadvertence might cause deprivation of any property right without compensation. This was disproportionate: an unfair and excessive burden was placed on the individual landowner.

[16.8] On the facts of *Beaulane* (where title to the land was registered), Beaulane, the paper-title holder, became trustee of its title for Palmer in June 2003, after the Human Rights Act 1998 came into force, but before the coming into effect of the Land Registration Act 2002.

[16.9] Nicholas Strauss QC, sitting as a deputy judge of the High Court, held that art 1 of the First Protocol was engaged; the effect of the Limitation Acts and the Land Registration Act 2002 was that the paper-title holder lost his property. It was irrelevant that the Acts merely regulated private transactions, and had no public purpose (at [164]).

[16.10] However, at this point, the history of adverse possession becomes relevant. (The case is notable for the full and scholarly account of the history of the subject.) The House of Lords in *Pye* were clearly unhappy with the result in the case; as Lord Hope stated, the unfairness in 'the old regime' was in the lack of safeguards against oversight or inadvertence by the holder of the paper title (at [73]). However, until some stage at or after the decision in *Leigh v Jack*, perhaps after *Littledale v Liverpool College* [1900] 1 Ch 19, [1895–9] All ER Rep Ext 1329, the law changed from an emphasis on possession that was inconsistent with the recognition of the owner's title (and thus more than wrongful possession) to an emphasis on the squatter's intention to possess (see O Radley-Gardner (2005) 25 OLJS 728).

[16.11] That position may well be unfair to the paper-title holder in land both of registered and unregistered title. However, in land of registered title, the registered proprietor relies not on his possession, or seisin, but on his registered title: the fact of registration. The Law Commission in their Consultative Document on Land Registration (Law Com no 254) and in

their commentary on the Land Registration Bill (Law Com no 271) emphasise in both the importance of the register being as inviolable as possible. Thus, many of the traditional justifications for adverse possession do not have the same weight – if, indeed, they have any weight – in the context of land of registered title (see *Beaulane* at [170]–[171]).

[16.12] The judge in *Beaulane* relied on the older law relating to intention. Cases such as *Powell v Mcfarlane* (1977) 38 P & CR 452 held that where there was a use by a squatter which conflicted with the intentions of the paper-title holder for his present or future use of the land, there was as a matter of law, an implied consent by the paper owner. This implied permission theory was abolished in 1980 by the Limitation Amendment Act 1980, s 4, now to be found in the Limitation Act 1980, Sch 1, para 8(4). In 1989, the *Leigh v Jack* line of authorities was virtually distinguished out of existence: see *Buckinghamshire County Council v Moran* [1989] 2 All ER 225 (All ER Rev 1989, pp 176–178). In short, what now mattered was the fact of possession, rather than the intention of the holder of the paper title. If (contrary to *Pye*) the intention of the owner of the paper title were relevant, then the legislation might be compatible with art 1 of the First Protocol. But it was not compatible: ‘the effect of the legislation as a whole is to deprive the owner of the land of all his rights to it and of any means, whether by taking direct action or by going to the law, of recovering possession if it, and thus to transfer the right to possession and title to the trespasser’ (*Beaulane* at [136]). There was thus a deprivation of property (at [161] ff).

[16.13] Whatever the position in unregistered land, where relativity of title was involved, title to land of registered title depends on the fact of registration (although the Land Registration Act 1925, s 70(1)(f) treated, as an overriding interest, an interest that had been or was being acquired under the Limitation Acts). Nicholas Strauss QC rejected the applicability of the arguments that, in land of registered title, prevention of stale claims, facilitation of conveyancing, promoting certainty of title, avoidance of hardship to the adverse possessor, and discouraging the use of land as a resource were in the public interest. He held that they were not in the public interest and were not sufficiently proportionate (at [170] ff).

[16.14] He interpreted s 75 of the Land Registration Act as being applicable ‘to those cases in which the trespasser establishes “possession” in accordance with the case law in existence at the time of its enactment’. Therefore, he said, ‘adverse possession’ in the Limitation Act 1980 was given the meaning it had under the case law following *Leigh v Jack*. In other words, the relevant case law was to be determined, not in 2005, but in 1925. In effect, therefore, for the purposes of Human Rights legislation, and the avoidance of the need for a declaration of incompatibility, a different definition is being adopted from that adopted by the House of Lords in *Pye* (admittedly in land of unregistered title) (*Beaulane* at [215] ff).

[16.15] Following the decisions of the ECHR in *Pye* and *Beaulane*, there are thus several possible regimes. For land of unregistered title before 2 October 2000, in English law, the intention of the holder of the paper-title holder was irrelevant, but the possession of the squatter was. According to the ECHR, however, that law contravened the European Convention of Human Rights. Land of unregistered title where the period of possession was completed after 2 October 2000 would, similarly, fall foul of English law, as being incompatible with art 1 of the First Protocol of the European Convention. Land of registered title, where the issue arose between the dates of 2 October 2000 (when the Human Rights Act 1998 came into effect) and 13 October 2003 (when the Land Registration Act 2002 came into effect) was covered by *Beaulane*. Land of registered title (subject to transitional provisions) will be caught by the Land Registration Act 2002, ss 96 and 97 and Sch 6. The Law Commission clearly believed that the new legislation was human rights compliant. However, the genesis of the Land Registration Act 2002 was well before the decision of the House of Lords in *Pye*, although the result in that case was (reasonably) foreseeable. The difficulty is that Nicholas Strauss QC has re-interpreted the law relating to adverse possession where there is land of registered title, by reference to an interpretation of what was (or was not) 'adverse possession' at the time of the Land Registration Act 1925. There is thus a major difference between the position laid down in *Beaulane* (which is said in *Pye* to be clearly wrong) and *Pye* itself. However, there is no logical reason why one interpretation of the case law and the history should operate in cases where a human rights issue was expressly raised, and another interpretation in cases in which it was not. This is an important point: para 11(1) of Sch 6 to the Land Registration Act 2002, in effect, confirms the established definition of adverse possession, and it is that which is now in doubt.

[16.16] That, in turn, may indicate that the Land Registration Act 2002 is not proof against attack under the Human Rights Act 1998. There is clearly a difference under the new legislation, in that the paper-title holder will be given a notice, and the proprietor has to respond to that. It may be that the difference in process (which gives the paper-title holder rights he did not have either under the Land Registration Act 1925, or at common law) is such that, even if it deprives an owner of his property, the new process is such that a registered proprietor will have had notice; this is a vital difference from the position under the Land Registration Act 1925, and may well be sufficient for any deprivation resulting from his action (based on knowledge of the position) to be regarded as proportionate.

[16.17] *Hill v Transport for London* [2005] EWHC 856 (Ch), [2005] 3 All ER 677 holds that where adverse possession is claimed against successive owners, one of whom is the Crown, the period of adverse possession was 30 years, not 12: the Limitation Act 1980, s 15 and Sch 1, para 10 provided a complete code for persons claiming through the Crown.

Easements

[16.18] In *Sweet v Sommer* [2005] EWCA Civ 227, [2005] 2 All ER 64n (M Thompson, [2005] Conv 545) the Court of Appeal upheld the judgment of Hart J ([2004] EWHC 1504 (Ch), [2004] 4 All ER 288n; All ER Rev 2004 at [16.8] ff. The Court of Appeal, however, did not consider the point (which was central to Hart J's judgment) that there was an implied easement of necessity by reservation (although Professor Thompson argues cogently that, on the facts, the decision was flawed: see [2005] Conv 547–548). Professor Thompson's comments on r 258 of the Land Registration Rules, benevolently but awkwardly construed by Scott J in *Celsteel Ltd v Alton House Holdings Ltd* [1985] 2 All ER 562 (All ER Rev 1985, pp 199–200), are also of interest: see [2005] Conv 549 ff. Whether the case provides any real guidance as to how the judges will interpret the new world of the Land Registration Act 2002 is difficult to say: the new Act (even more than the 1925 Act and the rules made thereunder) emphasises the importance of the register, rather than of a person's knowledge, and this, perhaps, militates against a generous interpretation of what may be implied or inferred on a transfer.

Restrictive covenants

[16.19] In last year's Annual Review, the decision of the Court of Appeal in *Crest Nicholson Residential (South) Ltd v McAllister* [2004] EWCA Civ 410, [2004] 2 All ER 991 was considered: see All ER Rev 2004 at [16.11]–[16.15]. Chadwick LJ held that, as far as restrictive covenants were concerned, the Law of Property Act 1925, s 78 was subject to a contrary intention. *Crest Nicholson* was the first case in which this point (which relied on a construction of the latter part of s 78(1), and which distinguished the position of positive and negative covenants) had been clearly expressed. In *University of East London Higher Education Corp v Barking and Dagenham London Borough Council* [2004] EWHC 2710 (Ch), [2005] 3 All ER 398 Lightman J followed this approach. On the facts, he found that the benefit of the covenants had been assigned; but in the alternative, he found that the benefit of the covenant was annexed to each and every part of the retained land; there was no relevant contrary intention expressed.

[16.20] A second point related to the ending of restrictive covenants by unity of seisin. It is well established that if restrictive covenants exist solely for the benefit of two adjoining properties, and those parties are bought by one person, the restrictions come to an end, and cannot be revived: *Texaco Antilles Ltd v Kernochan* [1973] 2 All ER 118. There must be unity not only of ownership, but also of possession; if an occupier (whether joint or sole) who could benefit or be burdened by the covenant existed, then that would prevent the ending of the restrictive covenants. However, there was an ancillary point. The London Borough of Barking and Dagenham (the LBBD) owned the two properties in question for

different statutory purposes: one for education, and one for housing. Had the LBBB been a trustee, and held on two different trusts, there would have been no merger; likewise, if the LBBB had been beneficial owner of one piece of land and trustee of another. Lightman J considered that this doctrine could be extended to the situation where both properties were held by a local authority for different statutory purposes: 'a blanket rule requiring such common ownership to operate to extinguish all restrictive covenants would prejudice the performance by the local authority of its statutory duties and fulfil no useful purpose' ([2005] 3 All ER 309 at [58]).

[16.21] Lightman J's judgment is clear, concise and well argued. On the facts of the case, the point relating to the Law of Property Act 1925, s 78 seems clear; but when the unity of seisin doctrine is applied, it may be difficult for parties to be satisfied that all the relevant land has been purchased by the common owner; and that there is not other land which might still have the benefit of a covenant under s 78. Land where there is a building scheme is not covered by the unity of seisin doctrine, but that, of course, does not involve the application of s 78. The final – and in some ways most difficult – point is the operation of the doctrine where land is held by a public authority, but for different statutory purposes. What would happen if the land were held for mixed purposes, or if a public authority, by statute or otherwise, had the power (which it chose to exercise) to alter the purposes for which the land was held? These matters were not necessary for Lightman J to determine but if the case is appealed (as appears likely: *University of East London Higher Education Corp v Barking and Dagenham London Borough Council (No 2)* [2004] EWHC 2908 (Ch), [2005] 3 All ER 416 at [2]), these issues may receive a broader airing.

The rights of the mortgagee

[16.22] *West Bromwich Building Society v Wilkinson* [2005] UKHL 44, [2005] 4 All ER 97 (G Griffiths [2005] Conv 469; D McIlroy (2005) 155 NLJ 1154; T Prime [2005] Conv 566) deals with a small, but vital point on the operation of the Limitation Acts in the context of mortgages; and, in so doing, casts some light on the cumulative nature of the mortgagee's rights under a mortgage deed.

[16.23] The facts were simple: the Wilkinsons had borrowed money from the West Bromwich Building Society on mortgage, using their house as security. Within months of the purchase of the property, they defaulted on their instalment payments; and in July 1989, the West Bromwich obtained an order for possession, which resulted in the property being sold, in November 1990. After sale, there was a shortfall; in 2002, within 12 years from the date of sale, the Wilkinsons were served by the West Bromwich with a claim for the shortfall, interest, and costs.

[16.24] The Limitation Act 1980, s 20(1) provides that no action may be brought to recover moneys due under a mortgage after 12 years from the

date the right to receive the money accrued. The Wilkinsons argued that the right accrued when they defaulted (in 1989/90) and was thus statute-barred; the West Bromwich argued that they were suing on the basis of a personal claim which, being contained in a deed, could be brought within 12 years of the cause of action accruing (Limitation Act 1980, s 8).

[16.25] The House of Lords, first, found that, as a general rule, time runs from the moment when the cause of action has arisen; it would be strange if a lender could stop time running by his own act in exercising the power of sale. *Bristol & West plc v Bartlett* [2002] EWCA Civ 1181, [2002] 4 All ER 544, [2002] 2 All ER (Comm) 1105 (All ER Rev 2002 at [16.8]) was rightly decided.

[16.26] Their Lordships examined the West Bromwich's (then) standard mortgage in some detail, and were critical of it (the form, the House of Lords were told, was no longer being used, perhaps in response to criticisms made in the Court of Appeal in *Wilkinson* itself). In particular, there was no provision defining the defaults that would cause the entire amount to be repayable. On the construction of the deed, however, the principal money became due one month after the Wilkinsons had defaulted on a monthly instalment under the mortgage.

[16.27] Lord Hoffmann left open the point that the right to recover the money (under s 20) might arise before the cause of action accrued (s 8).

[16.28] A further point (not considered by the House of Lords) arises under the Limitation Act 1980, s 29(5). When a right of action has accrued to recover any debt, and the debtor acknowledges that debt, time runs from the date of acknowledgment, not earlier, although what precisely will amount to an acknowledgment may not always be easy to determine: see D McIlroy (2005) 155 NLJ 1154.

[16.29] Thus, once again, the Limitation Acts, which, rather like Topsy, have 'just grown', do not present a particularly coherent picture. It is well established that the specific remedies of the mortgage under the mortgage deed (which make mortgages attractive for the lender, and enable the borrower to borrow money at a much lower rate than he or she will be offered on an unsecured loan) do not prevent the lender suing the mortgagor/borrower for debt on any outstanding balance. In times of rapidly rising property prices, this may not appear to be a matter of concern; but the events of the late 1980s (when an overheated property market was followed by a rapid crash – *Wilkinson* itself being an example) stand as a warning of what may happen; and, if interest rates rise rapidly beyond their current levels, borrowers may find it difficult to meet their monthly instalments, and the property market itself may stagnate – or worse. *Wilkinson* confirms that the personal remedy for debt is subject (in general terms) to the same time-scales as the rights arising under the mortgage deed; and that confirmation is to be welcomed.

The rule in *Re Hastings-Bass*

[16.30] The rule in *Re Hastings-Bass* [1974] 2 All ER 193 has been considered in recent years: see *Breadner v Granville-Grossman* [2000] 4 All ER 705 (All ER Rev 2000, pp 248–250) (where the rule was described as ‘an emerging principle’) and *Re Barr’s Settlement Trusts* [2003] EWHC 114 (Ch), [2003] 1 All ER 763 (All ER Rev 2003 at [17.24]–[17.35]). It has also been the subject of extra-judicial comment by Lord Walker of Gestingthorpe: see [2002] PCB 226. The judgment of Lloyd LJ (he was elevated to the Court of Appeal after the hearing, but before giving judgment) in *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 3 All ER 693 (K Shakespeare (2005) 155 NLJ 1216) is a further helpful analysis, and shows that the principle is clearly ‘emerging’. The facts are complex, but may be summarised inexactly as follows. The trustees of the Bedford Estate held property on discretionary trusts; they received incorrect tax advice and, as a result made an appointment to H; H in turn assigned his interest, and the property became subject to another settlement, which had a broader range of objects. As a result of the appointment, capital gains tax was payable: the advice the trustees had received indicated that it was not. The trustees applied to have the appointment set aside, relying both on the rule in *Re Hastings-Bass* and on the basis that the appointment was made under a mistake.

[16.31] Lloyd LJ lists the five situations where (apart from the rule in *Re Hastings-Bass*) an exercise of a discretionary power may be invalid (at [38]): where there is a formal or procedural defect; where the power has been exercised beyond its terms; where the exercise of the power may infringe the general law, for example, the rule against perpetuities; where the power may have been exercised for an improper purpose and where (most unusually) the trustees were unaware they had any discretion to exercise: see *Turner v Turner* [1983] 2 All ER 745 (All ER Rev 1983, p 351).

[16.32] He emphasised in *Sieff v Fox* (at [76]–[77]) that where trustees were not under a duty to act, the question to be asked was whether they *would* (Lloyd LJ’s italics) have acted differently; whereas if they were under a duty to act, the question was whether they *might* have acted differently. This is a distinction that has not always been apparent from the previous cases; it clearly has an intellectual attraction, as it places a significant emphasis on the dichotomy between duties on the one hand and powers and discretions on the other. If a document is well drafted, that distinction should cause few problems: but one should remember the statement of Lord Wilberforce in *McPhail v Doulton* [1970] 2 All ER 228 at 240 that:

‘it is striking how narrow and in a sense artificial is the distinction, in cases such as the present, between trusts ... and powers ... [W]hat to one mind may appear as a power of distribution coupled with a trust to dispose of the undistributed surplus, by accumulation or otherwise, may to another appear

as a trust for distribution coupled with a power to withhold a portion and accumulate or otherwise dispose of it.’

[16.33] The issue of whether an appointment that could be set aside was void or voidable was canvassed, but it was unnecessary to decide the point ([78]–[82]) (cf All ER Rev 2004 at [17.33]).

[16.34] There was no need for there to have been a breach of duty by the trustees, or by their advisers or agents. As suggested in All ER Rev 2003 at [17.34], this seems sensible: if the trustees have acted in error, limiting their errors to those that are in breach of their duty (or of someone else’s duty) is difficult to justify.

[16.35] A major issue, however, was whether a misunderstanding as to the fiscal position was enough to allow the *Hastings-Bass* principle to operate; in other words was a misunderstanding as to the fiscal effect of a transaction (as distinct from its legal effect) sufficient to allow the doctrine to operate? Lloyd LJ emphasised, where mistakes involving fiscal consequences were involved, that there might be a distinction between cases where mistakes were made by individual donors, and where mistakes were made by trustees. In the latter case, trustees were dealing with property that was not their own, but in respect of which they owed fiduciary duties; secondly, the taxation of trusts was more complex than the taxation of individuals. Fiscal consequences were matters that trustees should consider. In *Sieff v Fox* the trustees stated that they would not have made the appointment they did, had they been aware of the fiscal consequences. The result of this was that ‘the effect of the exercise is different from that which (the trustees) intended’ (*Sieff* at [49] and [113] ff). They had taken into account considerations they ought not to have taken into account, and they would not have acted as they did, had they known the true position.

[16.36] This general approach to fiscal misunderstandings is broader than that suggested by Lord Walker of Gestingthorpe in his lecture, published in [2002] PCB 226. His suggested test was whether the transaction concluded was essentially different from the transaction intended, and that lesser errors, amongst which he included knowledge of fiscal consequences, would not be correctable. This is likely to be an area where difficulties will arise. If, as in *Re Barr’s Settlement Trusts*, a mistake is to be made as to the amount the appointees or beneficiaries receive, that mistake is clearly within the rule. However, if there is a failure to understand (as in *Sieff v Fox* itself) the impact of capital gains tax, that, too, affects how much individual appointees or beneficiaries may receive. If a distinction were to be drawn between one beneficiary wrongly gaining an advantage over another, and the case where all the beneficiaries were to lose, that distinction appears somewhat arbitrary. (The position would be even more arbitrary if the misunderstanding in a non-fiscal case was how much could or should be distributed in total.) However, given the highly complex (and changing) regimes of taxation of trusts, what would be the

level of mistake at which a court should apply the principle? If the relevant fiscal legislation were amended after the exercise of that discretion (at least where there was no clear indication that this was likely) that would give no ground for judicial interference; likewise, if a judicial decision changed the law after the trustees had exercised their discretion, that, too, would give no grounds. (Again, it is difficult to articulate when a court would interfere if the trustees took no advice at all, believing, for example, that no CGT was payable.)

[16.37] However, the broader issue is whether fiscal consequences should be regarded as relevant at all. In reality, many trusts have been set up and administered so as to minimise (or avoid) tax; and much of the work of the draftsman and adviser involves detailed knowledge of the relevant law. Indeed, ignorance of such matters by a trust professional would certainly be negligence.

[16.38] There is, perhaps, an analogy with the jurisdiction under the Variation of Trusts Act 1958. Although tax avoidance was not mentioned in the Act, it was discussed in the debates on the Bill. The courts originally assumed (or asserted) that all tax avoidance was legitimate (see eg *Re Drewe's Settlement* [1966] 2 All ER 844n), and this has been an approach that has been generally adopted. However, *Re Weston's Settlements* [1968] 3 All ER 338 shows that, in some judicial minds, at least, there resided the concept of illegitimate tax avoidance. Moreover, the line of cases commencing with *Ramsay (W T) Ltd v IRC* [1981] 1 All ER 865 and *Furniss (Inspector of Taxes) v Dawson* [1984] 1 All ER 530 shows that the courts are not always at ease with tax avoidance (cf *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51, [2005] 1 All ER 97, All ER Rev 2004 at [27.5] ff). One is tempted to ask what the position would have been if the trustees had said that, had they known of (and understood?) a complicated anti-avoidance scheme, they would not have made the appointment they did.

[16.39] Lloyd LJ, however, was well aware that by extending the principle, he was running the risk that it might become too wide. He indicated that the court could control any application of the principle by three methods: (i) insisting on a stringent application of the tests laid down; (ii) taking 'a reasonable and not over-exigent view of what it is that the trustees ought to have taken into account'; and (iii) adopting 'a critical approach' to claims that the trustees would have acted differently; and it might be helpful (in some cases at least) if the Revenue were willing to be joined as a party (at [82]–[83]). This provides helpful guidance for the future. (See [21.18]–[21.19] below for further discussion of *Sieff v Fox*.)

Bribes and fiduciaries

[16.40] *A-G for Hong Kong v Reid* [1994] 1 All ER 1 (All ER Rev 1994, pp 252–253 and 366–367) was a decision of the Privy Council, which held

that an agent or other fiduciary who made a secret profit, by way of a bribe, was accountable to his or her principal or beneficiary. This was contrary to the decision of the Court of Appeal in *Lister & Co v Stubbs* (1890) 45 Ch D 1, [1886–90] All ER Rep 797, which treated the bribe as the property of the recipient; the relationship between the receiver and principal was one of debtor and creditor, nothing more. English cases since 1994 had not spoken with united voice as to whether *A-G for Hong Kong v Reid* had, in practice, overruled *Lister v Stubbs* (being a decision of the Privy Council it could not formally do so); in particular, the Court of Appeal in *Halifax Building Society v Thomas* [1995] 4 All ER 673 (All ER Rev 1995, p 319 and pp 451–452) had applied *Lister v Stubbs*, although *Thomas* was distinguishable from *Reid*.

[16.41] In *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 622 (Ch), [2005] 4 All ER 73 Lawrence Collins J unequivocally and enthusiastically held that *A-G for Hong Kong v Reid* was good English law. He considered that there were ‘powerful policy reasons’ for fiduciaries not being allowed to retain gains acquired in breach of their fiduciary duties (at [86]); and, in particular, he considered there was no injustice in depriving a creditor of an insolvent fiduciary of an asset for which the fiduciary had not given value, and which he would not have had (at [86]). That is to be applauded: clearly, creditors will believe that they should be paid in full; but the importance that the law properly attaches to a breach of fiduciary duty is such that their interests should take second place.

[16.42] However, even if *Lister v Stubbs* were still good law, the judge held that it was distinguishable: *Daraydan* was a case where the bribe derived directly from the claimant’s property; it was not a case where the price had been presumed to have been increased by the amount of the bribe. (On the facts, the invoices had been inflated by 10%, that being the amount of money that the contractors had had to pay to the recipient of the bribe; the payer of the invoices was unaware that 10% had been added for that purpose.) Secondly, the preparation of the invoices in that form was a fraudulent misrepresentation, ie that the invoice price was the true price.

[16.43] These distinctions clearly exist: but it is highly arguable that they are merely distinctions without a difference. If a bribe is paid, the assumption must naturally be that the money so paid should not have been; and that if a contract is involved, the contract price has been inflated by that amount. If the contract price has been thus inflated, it should surely be immaterial whether the invoice failed to disclose that payment was being made to the recipient of the bribe. At first instance, Lawrence Collins J was properly concerned to ensure that his judgment could not be overturned on appeal; and this may be the likely explanation of his distinguishing of *Lister v Stubbs*. However, it is to be hoped that, in

future, no such distinguishing is necessary, and that English law will clearly embrace the broad doctrine in *A-G for Hong Kong v Reid*. (See also [3.1] and [8.23] above.)

The vendor as trustee

[16.44] *Englewood Properties Ltd v Patel* [2005] EWHC 188 (Ch), [2005] 3 All ER 307 provides a used recapitulation of the position of the vendor under a contract for sale of land. It is well-established law that a vendor is in the position of a trustee – although a special sort of a trustee – see, for example, *Shaw v Foster* (1872) LR 5 HL 321, [1861–73] All ER Rep Ext 1220; *Lysaght v Edwards* (1876) 2 Ch D 499; and *Lake v Bayliss* [1974] 2 All ER 1114. The High Court of Australia has expressed a different view: see *Kern Corp Ltd v Walter Reid Trading Pty Ltd* (1987) 71 ALR 417 at 435, but the Law Commission (Law Com no 191) preferred to continue the use of the trust concept as imposing, in this context, certain duties on the vendor between contract and completion.

[16.45] In *Englewood Properties*, what was in dispute was not the existence of the duty, but the scope of it. A purchaser of leasehold property claimed that a vendor was under an obligation (not contained in the contract) to require the purchasers of other leasehold property from them to comply with covenants in an earlier lease. Lawrence Collins J held that there was a duty on the vendor to protect, until completion, the interest the purchaser had acquired under the contract; to take reasonable care to preserve the property in question, not to damage the property, nor to prejudice the purchaser's interest pending completion. These obligations did not extend to a duty to impose covenants on adjoining property unless that duty was expressly imposed by the contract of sale (at [58]).

Fiduciary duties

[16.46] *Hilton v Barker Booth and Eastwood (a firm)* [2005] UKHL 8, [2005] 1 All ER 651 (J Getzler (2006) 121 LQR 1) is a case which deals principally with the liability of solicitors (see [23.4]–[23.5] below). However, the case also casts light on the nature of fiduciary duties in general. Barkers (the solicitors) acted both for Bromage (known to Barkers to be a convicted fraudsman) and for Hilton, in the sale of property from Hilton to Bromage. Bromage quickly defaulted on the sales. The Court of Appeal had held that although there was a breach of fiduciary duty, there was an implied agreement by Hilton not to require Barkers to breach their (other) client's confidence, and there was thus no causal link between Barker's failure to decline to act for Hilton, and Hilton's loss: had Hilton retained another solicitor, that solicitor would be unlikely to have known of Bromage's record of fraud. The House of Lords rejected this: where a fiduciary has conflicting duties to different people, that in itself amounts to a breach of duty: *Moody v Cox and Hatt*

[1917] 2 Ch 71, [1916–17] All ER Rep 548; putting it simply, said Lord Walker of Gestingthorpe in *Hilton*, quoting Lord Cozens-Hardy MR in *Moody v Cox*: ‘his dilemma is his own fault’ (at [35]); Lord Walker later stated, ‘the fact that he has chosen to put himself in an impossible position does not exonerate him from liability’ (at [44]).

[16.47] There was, of course, a contract between Hilton and Barkers; and, as a result, Lord Walker did not consider the arguments as to whether the (allegedly) more stringent causal tests for loss under equitable claims should be applied (cf *Bristol & West Building Society v Mothew* [1996] 4 All ER 698 (All ER Rev 1996, pp 106–107, 406–409) and *Target Holdings Ltd v Redferns (a firm)* [1995] 3 All ER 785 (All ER Rev 1995, pp 325–326, 438–440)); there was a failure to disclose information about Bromage which would have caused Hilton to withdraw from the transactions. There was no implied consent by Hilton to surrender his right to disclosure of this information, and the strict fiduciary duty was not modified. A strict approach to the liability of fiduciaries has thus been maintained.

Charities

[16.48] There is no case on the definition or administration of charities this year, though, of course, the Charities Bill (reintroduced after the General Election) provides ample scope for discussion and argument. There is, however, a helpful case on the Charitable Trusts (Validation) Act 1954: *Ulrich v Treasury Solicitor* [2005] EWHC 67 (Ch), [2005] 1 All ER 1059. The Act was passed, following the decision of the House of Lords in *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] 2 All ER 60, and the Report of the Nathan Committee. The Act provided, in general terms, that where property could be devoted to purposes that were not charitable, as well as to those which were charitable, the instrument would be construed as being for charitable purposes only: this applied to instruments taking effect before 16 December 1952, the date of the publication of the Nathan Report. The Act has given rise to difficulties in situations where there is no express mention of charitable purposes, but where the purposes described can be construed as including purposes which are charitable. In *Ulrich*, Hart J examines the authorities in detail; he adopted a benevolent construction; the Act assumed that the instrument could be construed so that no one could legitimately object if the whole of the fund were devoted to charity (at [29]). This implied that the vagueness of the words used was irrelevant; there was no need to look for language which contemplated application both to charitable and to non-charitable purposes. As Harman J stated in *Re Gillingham Bus Disaster Fund* [1958] 1 All ER 37 at 40, ‘the vaguer the words are, the better they will do’. Harman J used this in a pejorative way; Hart J, however, considered that ‘in the context of an act designed to cure past imperfection, and enacted against the background of a case which ...

had resulted in executors having their private fortunes impounded and an ensuing suicide' (*Ulrich* at [32]), such a broad construction was to be applauded.

[16.49] It is perhaps surprising that instruments which became effective before 1952 are still being litigated. But the fact is that they are: *Ulrich* offers a benevolent construction to them, which, in Hart J's view, is beneficial. The only doubt may be whether this broad approach may encourage those administering established trusts to consider making an application to take advantage of the 1954 Act. The risk is probably small.

[16.50] A broader issue, however (and one that has been raised frequently since 1954) is whether the Act should have been extended to cover not only past cases, but also to instruments which became effective after 1952. Some Commonwealth jurisdictions have legislation which provides (in effect) for a 'blue-pencil' test (see eg New South Wales Conveyancing Acts 1919–1969, s 37D (cf *Leahy v A-G for New South Wales* [1959] 2 All ER 300, PC). English law has no such provision, preferring to rely on compensation through actions for professional negligence, and the (perhaps remote) possibility of rectification.

Miscellaneous

[16.51] *R (on the application of Norfolk County Council) v Secretary of State for Environment, Food and Rural Affairs* [2005] EWHC 119 (Admin), [2005] 4 All ER 994 considers how to interpret and construe the definitive map and statement under Pt III of the Wildlife and Countryside Act 1981, ss 53 and 56. Pitchford J held that the definitive map (rather than the accompanying statement) was the primary and core document; and was conclusive until the matter was reviewed. On review, however, the judge held that neither the map nor the statement was conclusive, and there was no presumption that the map was correct.

[16.52] *R (on the application of Ashbrook) v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 2387 (Admin), [2005] 1 All ER 166 holds that the Secretary of State is under no obligation under the Law of Property Act 1925, s 194(1) to hold an inquiry before giving consent for the erection of a fence; the statute stated that an inquiry should be held 'if necessary', and the language of the section thus gave discretion.

Landlord and Tenant

PHILIP H PETTIT, MA

Barrister, Emeritus Professor of Equity, Universities of Bristol and Buckingham

Construction of s 141(2) of the Law of Property Act 1925

[17.1] The essential facts in *Scribes West Ltd v Relsa Anstalt* [2004] EWCA Civ 1744, [2005] 2 All ER 690 were that in 1991 House of Fraser plc granted a lease of business premises to Scribes West Ltd (SW). On 10 November 1993 the first defendant Relsa Anstalt (RA) was registered as freehold proprietor of the premises. It is not stated whether this was as a result of a direct transfer from House of Fraser plc or whether there were intermediate transfers, but this is not significant. On 1 May 1997 SW ceased trading and on the same day obtained a licence to assign the lease to London Sportsman's Club Ltd (LSC) and the assignment was presumably duly executed because otherwise SW would not have been able, as it did, to enter into a second charge over the leased premises to secure a loan it had made to LSC. In November 1999 SW entered into a voluntary arrangement with its creditors. On 28 February 2001 RA assigned its reversionary interest to Relsa Bankers (RB) on a standard Land Registry form (TR1) under which 'the transferor transfers the property to the transferee'. On the same day RB gave notice to LSC of the assignment and required LSC to pay the rent to it. The transfer from RA to RB was not, however, registered at the Land Registry until 3 January 2002. In the meantime, on 16 July 2001 RB peaceably re-entered the premises on the ground of arrears of rent, and on 25 July 2001 granted a new lease to a company called Settle Up Ltd. The sole issue before the court was whether for the purposes of a valid forfeiture by RB it was sufficient that the transfer of the reversion had been executed and notice given to LSC, notwithstanding that the transfer had not been registered. The only reasoned judgment was given by Carnwath LJ, with whom the other members of the court expressed their agreement.

[17.2] It was common ground: (i) that the transfer of a registered estate is not completed until registration, and until then the transferor remains the proprietor of the legal interest; (ii) that before registration the transferee becomes the owner in equity and the transferor ('transferee' in the report is a misprint, which it is understood will be corrected in the online version) holds the land on trust for him; and (iii) that an equitable assignment of a chose in action (which includes a right to rent) requires no more than an expression of intention to assign, coupled with notice to the debtor, to impose on the latter an obligation to pay the assignee.

[17.3] The decision turned on the construction of s 141(2) of the Law of Property Act 1925 which, referring back to s 141(1) dealing with rent reserved by, and covenants and provisions contained in, a lease, provides:

‘Any such rent, covenant or provision shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.’ (Carnwath LJ’s emphasis.)

Section 141 substantially reproduces s 10 of the Conveyancing Act 1881. One case that caused difficulty before the 1881 Act was where after the grant of a lease the lessor mortgaged his interest in the usual way by a conveyance to the mortgagee subject to a proviso for reconveyance on redemption of the mortgage. It was accepted that in such case the mortgagor in possession continued to have a legal right to recover the rents in his own name, but, since he had no legal interest in the reversion, he could not forfeit for breach of covenants in the lease. The effect of s 10 of the 1881 Act was to remedy this situation and in the instant case it was contended that this was the sole purpose of that section, and now of s 141, which accordingly applied only in relation to mortgages. Carnwath LJ said that the two Court of Appeal cases relied on in support of this argument – *Turner v Walsh* [1909] 2 KB 484, [1908–10] All ER Rep 822 and *Schalit v Nadler Ltd* [1933] 2 KB 79, [1933] All ER Rep 708 – did not really assist the argument. There was, in his opinion, nothing to detract from the natural meaning of the section. This led to the conclusion that although RB was not the registered freehold proprietor of the premises, it had taken a valid equitable assignment of the rents, and notice had been given to the lessee. It was therefore entitled (albeit only in equity) to receive the rents of the property, which was sufficient to bring it within the emphasised words of s 141(2). It was held not to matter if this in theory resulted in RB having that right concurrently with RA as legal owner. The section, it was said, was designed to extend rights to enforce, without taking away existing rights, and, in any event anything done by RA could only be done as trustee for RB.

Recovery of possession from a tenant under an assured tenancy

[17.4] In *North British Housing Association Ltd v Matthews; London and Quadrant Housing Trust v Morgan* [2004] EWCA Civ 1736, [2005] 2 All ER 667 the Court of Appeal dealt with four cases raising the question of the power of the court to adjourn possession proceedings so as to allow the tenant to pay rent arrears and thus defeat the possession claim. The effect of the Housing Act 1988, s 7 and Sch 2, Pt 1, ground 8, is that if the court is satisfied that both at the date of service of the notice of proceedings for possession and at the date of the hearing the arrears exceed eight weeks’ rent, ‘the court shall make an order for possession’. Section 9 of the Act gives what the marginal note describes as an ‘extended discretion of court in possession cases’ to adjourn proceedings, but sub-s (6) of that section provides that the section does not apply if the

court is satisfied that the landlord is entitled to possession on the ground, inter alia, of arrears of rent as referred to above. There are, further, very wide general powers given to the county court to adjourn proceedings by the County Courts Act 1984 and the Civil Procedure Rules.

[17.5] On behalf of the landlords it was submitted that s 9 provides a complete code which defines the power of the court to grant adjournments in claims for possession for a dwelling house let on an assured tenancy, and impliedly disapplies the relevant provisions of the 1984 Act and the CPR. Dyson LJ, giving the judgment of the court, said that it was not necessary to decide this point.

[17.6] The court first considered what was the power to adjourn before it was satisfied that the landlord was entitled to possession. The court clearly cannot be so satisfied before the date of the hearing because ground 8 only applies where there is at least eight weeks' arrears at that date: the date of the hearing means the date when the claim is heard, not the date fixed for the hearing even if on that date an adjournment is granted without a hearing taking place.

[17.7] It was common ground that there were circumstances where it would be proper to grant an adjournment of the hearing date even though this may, on the one hand, deprive the landlord of his entitlement to possession (the tenant pays off sufficient arrears before the adjourned hearing date), or, on the other hand, give the landlord a right to possession he would not have had at the original fixed date (further arrears accrue so they now exceed eight weeks). Several instances of circumstances which might be a good reason for adjournment were given: a case may have to be taken out of the list because there is no judge available or because there has been overlisting. A quite different case might be where before the hearing date the landlord has accepted a cheque from the tenant for a sufficient sum to reduce the arrears below eight weeks but the cheque has not been cleared by the hearing date. In none of the illustrations given was it the purpose of the adjournment to change the substantive position of the parties, though this might be its effect because it may give the tenant an opportunity to reduce his arrears at the date of the adjourned hearing to below the specified eight weeks.

[17.8] The question the court had to decide was whether before it is satisfied that the landlord is entitled to possession it has the power to grant an adjournment for the purpose of enabling the tenant to pay off arrears thereby defeating the claim for possession, and, if so, in what circumstances the power should be exercised. After considering several cases, including *R v Walsall Justices, ex p W (a minor)* [1989] 3 All ER 460 (discussed All ER Rev 1989 at pp 109, 296); *R v Dudley Magistrates' Court, ex p Hollis* [1998] 1 All ER 759 (discussed All ER Rev 1998 at pp 451–452); and *Bristol City Council v Lovell* [1998] 1 All ER 775 (discussed All ER Rev 1998, pp 293–294, 453), Dyson LJ concluded that in general the court should not adjourn a hearing date for the purpose of

enabling a defendant to rely on a subsequent change in the law or the facts and thereby to defeat the claim. It is only in exceptional circumstances that the court should depart from the general rule. An example of exceptional circumstances would be where the tenant, on his way to the court for the hearing with the arrears of rent in cash in his pocket, was robbed and all his money stolen. In the cases before the court the tenants had fallen into arrears by reason of the maladministration or other unjustified failure of the housing benefit authorities to pay housing benefit. This, it was held, was not an exceptional circumstance. 'It is', it was said, 'a sad feature of contemporary life that housing benefit problems are widespread'. The unfortunate consequence may be that tenants on housing benefit have no defence to a claim for possession in circumstances where they are not at fault.

[17.9] The court next considered whether there was power to adjourn after the court was satisfied that the landlord was entitled to possession. Here s 9(6) makes it clear that there is no such power in any circumstances. The court, however, cannot be said to be 'satisfied' until the judge has given a judgment and effect has been given to that judgment in a perfected order of the court. A judge can correct a judgment at any time before, but not after, the court order has been sealed or otherwise perfected: see *Stewart v Engel* [2000] 3 All ER 518 (discussed All ER Rev 2000 at pp 300–301).

[17.10] In the light of the above all the appeals were dismissed, but the court thought fit to suggest that the Housing Corporation might consider it wise to expand its advice about the need for effective liaison with housing benefit departments right up to the time when a possession claim for rent arrears is heard.

[17.11] The court further held that it was too late to allow an amendment to the notice of appeal so as to introduce a new ground of appeal. This was that in the circumstances that the respondent, a registered social landlord, was aware of the maladministration and its effect, the judge should have adjourned the claim for possession on the basis that (a) the decision of the landlord to proceed with the possession claim was arguably irrational and/or otherwise unlawful, and/or (b) that the landlord being arguably a functional public authority, an order for possession would be a breach of the appellant's art 8 rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. This was said to raise 'interesting arguments' that would have to await another case for consideration.

Leasehold enfranchisement

[17.12] *Cadogan v Search Guarantees plc* [2004] EWCA Civ 969, [2005] 1 All ER 280 raised a pure question of construction of s 1(1ZB) of the Leasehold Reform Act 1967 (the Act), inserted by the Commonhold and Leasehold Reform Act 2002, s 138(2). This provides:

‘Where a flat forming part of a house is let to a person who is a qualifying tenant of the flat for the purposes of Chapter 1 or 2 of the [Leasehold Reform, Housing and Urban Development Act 1993] a tenant of the house does not have any right under this Part of the Act unless, at the relevant time, he has been occupying the house or any part of it, as his only or main residence (whether or not he has been using it for other purposes)—(a) for the last two years, or (b) for periods amounting to two years in the last ten years.’

[17.13] The facts were not in dispute. The appellant, Search Guarantees plc, was the registered proprietor of a long lease of a house comprising six flats or maisonettes, five of which were sublet on short-term tenancies, the sixth being a caretaker’s flat. For the purposes of the Act the appellant, being a company, could not occupy property as its residence: s 37(5). The respondents, Earl Cadogan and Cadogan Estates Ltd, held the freehold reversion. By a notice dated 17 December 2002 the appellant applied to the respondents to acquire the freehold reversion pursuant to s 1 of the Act. The respondents in March 2003 served due notice claiming that the appellant was not entitled to enfranchise because it did not satisfy the requirements of s 1(1ZB) set out above.

[17.14] The parties were agreed on two points. First that under s 101(3) of the Leasehold Reform, Housing and Urban Development Act 1993 a head lessee can be a ‘qualifying tenant’ for the purposes of Chs 1 and 2 of Pt I of that Act – see *Crean Davidson Investments Ltd v Earl Cadogan* [1998] 2 EGLR 96. Secondly, under s 39(4) of the same Act, a person can be the qualifying tenant of each of two or more flats at the same time, whether he is a tenant of those flats under one lease or under two or more separate leases. It was further agreed that, because the flats in the premises were sublet on short-term tenancies, the tenant under the headlease, the appellant, was the ‘qualifying tenant’ of each flat. It was also, by virtue of the headlease, the tenant of the whole house. The question before the court was as to the application of s 1(1ZB) of the 1967 Act where the appellant was both the tenant of the house and a qualifying tenant of the flats.

[17.15] The first instance judge applied a literal – one might say the natural – construction of s 1(1ZB). The condition was satisfied in that the flats, each of which was part of the house, were let to a qualifying tenant. In such case the section, set out at [17.12] above, provides that the tenant of the house can only have a right to enfranchise if he meets the occupancy requirement, which, as a company, it could not do. The conclusion was that the appellant, the tenant of the house, had no right to enfranchise.

[17.16] In reversing the decision the Court of Appeal adopted a purposive approach. Laddie J, who gave the only reasoned judgment, referred to the history of the legislation. In its original form, s 1 of the

1967 Act only conferred a right to enfranchise on a tenant occupying a house as a residence for the last five years or for periods amounting to five years in the last ten years (five reduced to three by the Housing Act 1974, s 118(1)). The effect of the residence requirement made it impossible for a company to enfranchise (a fact of which landlords often took advantage) and also in most cases resolved the conflicts between different people who might be interested in enfranchising the same premises. The amendments introduced by the Commonhold and Leasehold Reform Act 2002 largely removed the residency requirement for enfranchisement and thereby allowed company tenants to qualify for enfranchisement.

[17.17] The Commonhold and Leasehold Reform Act 2002 not only introduced into the 1967 Act, s 1(1ZB), set out at [17.12] above, but also s 1(1ZA), which provides as follows:

‘Where a house is for the time being let under two or more tenancies, a tenant under any of those tenancies which is superior to that held by any tenant on whom this Part of this Act confers a right does not have any right under this Part of this Act.’

The clear intention of this, Laddie J said, was to resolve conflicts between different tenants, which would have surfaced because of the removal of the residency requirement. The subtenant can enfranchise, those higher up the ladder cannot.

[17.18] On behalf of the appellant it was argued that s 1(1ZB) has the same purpose as s 1(1ZA), namely to resolve potential conflicts between different tenants at different levels in the chain. It is dealing with who is to have the right to enfranchise when there is a tenant of the house and also a tenant of a flat forming part of the house, those being different people. Laddie J accepted this argument, but something has gone a little wrong with the restatement of the argument in (at [16]), where it is said to be –

‘... the reference in s 1(1ZB) to a situation “[w]here a flat forming part of a house is let to a person who is a qualifying tenant of the flat for the purposes of Chapter 1 or 2 of Part 1 of the [1993 Act]”, ... the tenant of the flat is someone other than the tenant of the house. So construed, the section does not apply to the appellant and, therefore, does not prevent it from obtaining enfranchisement.’

The sense calls for words such as ‘is to one where’ to be inserted after ‘[1993 Act]’, or perhaps simply for ‘in’ to be inserted after ‘that’ and before ‘the reference, in the first line. It is understood that an amendment will be made in the online version of the report.

[17.19] On the appeal the respondent sought to raise a new point in reliance on s 1(1B) of the 1967 Act inserted by the Commonhold and Leasehold Reform Act 2002, s 139(2), which excludes from Pt I of the Act business tenancies within Pt II of the Landlord and Tenant Act 1954 unless a residency requirement is fulfilled, which, again, the respondent could not fulfil. The main argument was that the appellant, as a

commercial landlord, occupied the premises for business purposes and fell within s 1(1B). No decision was made on this point, for the court held that it was too late for it to be raised. There was no suggestion that the point could not have been raised earlier, nor had any compelling reason been presented why it should be allowed at this stage.

[17.20] In *Fattal v Keepers and Governors of the Free Grammar School of John Lyon* [2004] EWCA Civ 1530, [2005] 1 All ER 466 the procedures had been gone through for the enfranchisement of the property of which the appellants were tenants, but completion of the transaction had not taken place because the parties had been unable to agree a price. Under s 9(1A) of the Leasehold Reform Act 1967, inserted by the Housing Act 1974, the price payable was to be 'the amount which at the [valuation date] the house and premises, if sold in the open market by a willing seller, might be expected to realise' on six assumptions. The case turned on the construction of assumption (d):

'... on the assumption that the price be diminished by the extent to which the value of the house and premises has been increased by any improvement carried out by the tenant or his predecessors in title at their own expense.'

Considerable improvements had been carried out by the tenants at their own expense.

[17.21] Section 9(1A)(d) was recently before the House of Lords in *Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] UKHL 32, [2003] 3 All ER 975 (discussed All ER Rev 2003 at [18.32]–[18.35]), but the point there was quite different from that now before the court. Sir Martin Nourse, who gave the only reasoned judgment, however, found some of the observations made helpful. He quoted Lord Hoffmann, who had said:

'[19] ... What does it mean to say that the value of the house and premises has been increased by the improvement? In my opinion, it signifies a simple causal relationship: but for the improvement, the house and premises would have been worth less. The comparison is between the value of the house as it stands and what its value would have been if the improvement had not been made.'

[20] The hypothetical house envisaged by this comparison is in my opinion one which has all the features of the real house, including its history, save for one: that the improvement in question had not been made.'

and Lord Millett, who stated:

'The "extent to which the value of the house and premises has been increased" by an improvement is simply the difference between the value of the property with the improvement in question and the value of the property without it.'

[17.22] On the basis of these observations, it was accepted that a comparison must be made as at the valuation date between the value of the property in its improved state and the value it would have had if it had

not been improved. The dispute related to the unimproved valuation: should this or should this not include an element for the potential to make improvements? This was rightly held to be a question of law, not merely a matter of valuation. Affirming the decision of the Lands Tribunal, it was held that an increase in value caused by an actual improvement must be calculated as an excess over the unimproved valuation (including the value of the potential for improvements), notwithstanding that the potential is merged in or absorbed by the actual improvement. The method for valuing the potential is a matter of valuation, not of law. However, the agreed method adopted by the valuers in the case, namely to calculate a percentage of the value of the improvements themselves, was said to be the standard method adopted by the Lands Tribunal since its decision in *Norfolk v Masters, Fellows and Scholars of Trinity College, Cambridge* (1976) 32 P & CR 147.

[17.23] On the footing set out in the preceding paragraph, a further point made on behalf of the tenants was that the Lands Tribunal ought to have assumed, not only that the improvements had never been carried out, but also that the planning permissions which enabled them to be carried out had never been obtained. This contention was rejected. An improvement is a physical concept. It is the increase in value caused by the physical works which has to be subtracted: the existence or availability of planning permission is not part of those works.

[17.24] *9 Cornwall Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2005] EWCA Civ 324, [2005] 4 All ER 1207 raised a question of construction on the Leasehold Reform, Housing and Urban Development Act 1993, which, as is well known, for the first time conferred on tenants of flats rights to collective enfranchisement of the premises containing their flats and to the grant of new leases. In the early part of his judgment Auld LJ explained the legislative scheme of the relevant part of the Act. The procedure set out in s 13 of the Act had been followed and the matter initiated by the service of a notice on the defendant landlord on behalf of the tenants claiming to exercise their right of collective enfranchisement and specifying a proposed purchase price of £210. On receipt of a valid notice by the landlord, s 21 requires that he should respond by the service of a counter-notice, which must state either that he admits that the tenants are entitled to exercise their right to enfranchisement, or that he does not admit that the tenants are so entitled. If he admits the entitlement, the counter-notice must state which (if any) of the proposals in the initial notice he accepts and specify in relation to any proposals which he does not accept his counter-proposals. If the landlord fails to serve a valid counter-notice, s 25 provides that the court 'may', on an application on behalf of the tenants, make an order determining the terms on which they are to acquire, in accordance with the proposals, including those as to price, in the initial notice, the freehold interest sought. The Court of Appeal has held in *Willingale v Globalgrange Ltd* [2000] All ER (D) 320 that 'may' in the context of the

section means 'must' or, to put it another way, means 'shall have the power to' and does not confer on the court a discretion whether or not to make the order. This means that in the absence of a counter-notice the landlord cannot challenge the tenants' proposals, including those as to price, as stated in the initial notice.

[17.25] In the case before the court the landlord in fact responded in good time by the service of a counter-notice under s 21, admitting the right to collective enfranchisement and accepting the tenants' proposals save for the purchase price. The landlords, having taken professional advice, made a counter-proposal that the purchase price should be £130,000. (The valuer subsequently, in evidence, said that this was some £20,000 too high.) The tenants, citing *Cadogan v Morris* [1999] 1 EGLR 59, also a Court of Appeal decision, contended that the price contained in the landlord's counter-proposal was unrealistic. As a consequence, it was further contended, the counter-notice was invalid, with the further consequence that the tenants were entitled to acquire the freehold for the price of £210.

[17.26] *Cadogan v Morris* did not concern a claim for collective enfranchisement but a notice by an individual tenant in support of his claim to acquire a new lease under Ch II of Pt I of the 1993 Act. However, the relevant procedural provisions corresponded with those relating to collective enfranchisement and it was agreed that the test set out in *Cadogan v Morris* applied to collective enfranchisement notices as well as to notices in relation to the grant of a new lease. This had been clearly accepted in *Willingale v Globalgrange Ltd*. In *Cadogan v Morris* the tenant's notice proposed a nominal premium of £100 for a new lease, when it was common ground that the premium would be at least £100,000. The court held that, as the tenant had proposed only a nominal figure, one that he clearly did not propose to pay, the notice was invalid. In order to be a valid notice the price proposed must be realistic.

[17.27] On the present appeal the tenants supported the reliance by the first instance judge on the ordinary canons of construction that a consistent meaning should be given to the same word in different sections of a statute. The Court of Appeal, however, was persuaded by the landlord's argument that there were special reasons why this was not applicable in this case. The common purpose of both the notice under s 13 and the counter-notice under s 21 is to set the scene for a process of negotiation, not a definition of issues for final determination of the matter by litigation. The difference between them is that the effect of s 25, as has been noted above, is to enable the proposed purchase price in a tenants' s 13 notice to determine the terms of acquisition in the event of the landlord not serving a s 21 counter-notice. No such default advantage can accrue to the landlord if, for any reason, a s 13 notice is invalid. This merely gives the tenants an opportunity to serve a fresh notice. There is not, therefore, the same imperative for the courts to qualify the expressly

unqualified words of the 1993 Act in relation to s 21, as the court did in *Cadogan v Morris* in relation to s 13 to prevent the tenants from abusing their entitlement to acquisition on their terms in default of a counter-notice. The practical result, as expressed by Wilson J (at [83]), is that:

‘it is open to the landlord to specify any price, however high. He will, no doubt, be foolish to specify a demonstrably excessive price because, unless it be soon reduced, it is likely to propel the parties to litigation in the tribunal, in relation to which he will in any event bear most of his own costs.’

Right to buy

[17.28] Neither party could be accused of an excess of zeal in dealing with the matter which came before the court in *Hanoman v Southwark London Borough Council* [2004] EWHC 2039 (Ch), [2005] 1 All ER 795. It began when the respondent council received on 14 November 1999 a notice claiming to exercise a right to buy. It was signed by the person claiming the right to buy and the appellant contended that it was his signature. On receipt of the notice the council came under a duty imposed by s 124 of the Housing Act 1985, unless the notice was withdrawn, to serve on the tenant within four weeks a written notice either (a) admitting the right, or (b) denying it and stating the reasons for the denial. The judge, Peter Smith J, stressed the use of the word ‘shall’ in the section: ‘... the landlord shall ... serve ... a written notice.’ The council did not serve a notice within four weeks. It was not until 17 January 2000 that it took any steps, when, being concerned by a apparent disparity between the signature on the notice of application and that on the original tenancy agreement of 16 March 1984, it wrote to the appellant asking him to attend for the purpose of identification bringing with him two items of identification from a list of documents provided. If the appellant was not the secure tenant under the tenancy agreement he was not, of course, entitled to claim a right to buy, and, moreover, he might be liable for attempting to obtain a property right by some kind of deception.

[17.29] The evidence accepted by the judge was that on 18 January the appellant telephoned the council and spoke to a Mrs Ward. He told her that he did not have any of the documents referred to and suggested that she get in touch with housing officers. She insisted that she needed documentary evidence, but said she would get back to him. She wrote to him on 17 February repeating her request for documentary evidence and giving him seven days in which to come into the office with the documentation. The letter continued: ‘If we do not hear from you in this time I regret to inform you that you [sic] will have no other choice but to withdraw your application for the right to buy.’ The council did not hear from the appellant, for the very good reason that, on the evidence accepted by the judge, he did not receive the council’s letter. Accordingly it treated the application as withdrawn: the case was closed and the papers filed. The council made no attempt to inform the appellant of its action.

[17.30] The appellant made no inquiries about his application for nearly two years. His reasons were: (i) that he was waiting for Mrs Ward to get back to him; (ii) he believed that the council's procedures were slow; and (iii) that he believed the council were doing all they could to frustrate his right to buy. The judge rejected this, but this did not detract from the fact that the appellant had this belief.

[17.31] Counsel for the council accepted that the wording of the letter referred to at [17.29] above was unfortunate, as it undoubtedly was. With respect, however, as reported, it does not, as the judge stated, 'actually say[s] that unless he [the appellant] provides the information they [the council] will withdraw the application'. In fact it says that in these circumstances the *appellant* (my emphasis) will have no choice but to withdraw the application. In the light of the judge's observation, one wonders whether there is a printer's error and 'you' should read 'we'. Counsel argued that what the letter meant was that in these circumstances the council would treat the application as withdrawn. The actual construction to be put on the letter did not in the event matter, for the judge was clearly right to say (i) that the council had no power to withdraw the application, and (ii) that it had no power to treat an application as withdrawn because an applicant had failed to provide information within a short period of time of a unilaterally imposed deadline. In the context of the case before the court the seven-day time limit was plainly unreasonable.

[17.32] The council was already in breach of its statutory duty (see at [17.28] above) by the time of its first letter on 17 January, and there was a continuing duty which had not been discharged. There was no duty on the appellant to do anything other than wait for a decision on the part of the council to respond to his notice claiming a right to buy. Admittedly, there could be circumstances where an claimant of a right to buy might lose his right if, for instance, he had conducted himself in such a way as to amount to a waiver of his rights or to operate as an estoppel against him enforcing his rights or such that it might be unconscionable for him to seek to enforce his rights. There were no such circumstances in the instant case. The first instance judge had focused too much on the period of delay without asking the question as to why the delay occurred or where the responsibilities, at that time in the exercise, fell. Accordingly, the appeal was allowed and a negative declaration was made that the appellant's notice, seeking to exercise his right to buy, had not lapsed or been withdrawn and was still valid and subsisting.

Right to acquire reversion under the Landlord and Tenant Act 1987

[17.33] In *Denetower Ltd v Toop* [1991] 3 All ER 661 (discussed All ER Rev 1991 at pp 225–256, 322) Browne-Wilkinson V-C described the Landlord and Tenant Act 1987 (the Act) as 'ill-drafted, complicated and confused', a criticism which Bingham MR said, in *Belvedere Court*

Management Ltd v Frogmore Development Ltd [1996] 1 All ER 312 (discussed All ER Rev 1996 at pp 282–284, 285, 420, 428), was understated. Geoffrey Voss QC, sitting as a deputy judge of the High Court, had the unenviable task in *Long Acre Securities Ltd v Karet* [2004] EWHC 442 (Ch), [2005] 4 All ER 413 of dealing with yet another problem thrown up by the Act. As is well known, the Act conferred on ‘qualifying tenants’ a right of first refusal when the landlord proposes a disposal of the property of which they are tenants. *Long Acre* concerned an estate consisting of some 55 flats in several blocks and a number of commercial shop premises. The tenants of the flats shared the use of the same access way, amenity areas or gardens, parking areas, yards, paths and roadways. Long Acre, the landlord, being itself the tenant holding an underlease of the estate, wished to dispose of part of its interest in the underlease and on 31 January 2003 served a notice under ss 5 and 5B of the Act upon the residential tenants of the flats stating its intention to dispose of its interest in what it described as the ‘Building’ at a public auction on 2 June 2003. The notice defined the ‘Building’ as the 55 flats ‘together with all roads access ways footpaths stairwells giving access and egress from and including the whole of the premises demised by the Underlease’ under which it held, but excluding the commercial premises.

[17.34] The defendant tenant challenged the validity of the notice, going so far as to write to the proposed auctioneers asserting that they ‘would be a party to a criminal offence if [they] knowingly sold the lot without valid notice having been served under s 5B’ of the 1987 Act. Nor surprisingly, the estate was withdrawn from the auction and the question before the court was as to the validity of the notice. The ground on which it was alleged that the notice was invalid was that each structure was not the subject of a separate notice.

[17.35] Geoffrey Vos QC, set out at length the relevant provisions of the 1987 Act, observing that the word ‘building’, the crucial word in the case, was not defined in the Act. Long Acre argued for a purposive construction, contending that the word ‘building’ should be construed as including a ‘building scheme’, by which it meant any building or buildings built as part of a single development at the same time, as was the estate in the case before the court. Long Acre further contended that it would be horrendously complex and unworkable to force it to serve separate notices in respect of each of the four separate structures, to divide up the gardens and roadways, and to provide for appropriate rights of way and drainage and the like. Long Acre also framed an alternative argument based on the Human Rights Act 1998.

[17.36] In his judgment Geoffrey Vos QC referred to four cases, all decided before the amendments made to the 1987 Act by the Housing Act 1996. In *30 Upperton Gardens Management Ltd v Akano* [1990] 2 EGLR 232 a Leasehold Valuation Tribunal held that the words ‘they consist of the whole or part of a building’ in s 1(2)(a) should be construed

as if it read 'they consist of the whole or part of a building or building scheme'. In *Denetower Ltd v Toop*, referred to at [17.33] above, Browne-Wilkinson V-C, giving the only substantive judgment, assumed that the term 'building' in s 1(2) could apply to more than one separate structure. These two cases gave support to Long Acre's argument. *Belvedere Court Management Ltd v Frogmore Developments Ltd*, also referred to at [17.33] above, was cited by Geoffrey Vos QC for the approach to the legislation which attracted Hobhouse LJ, namely that it should be considered which of the provisions are substantive and which are secondary, that is, simply part of the machinery of the legislation. Provisions in the latter category should be examined to assess whether they are essential parts of the mechanics or are merely supportive of the other provisions so that they need not be insisted on regardless of the circumstances. The last of the four cases cited, *Kay Green v Twinsectra Ltd* [1996] 4 All ER 546 (discussed All ER Rev 1996 pp 285–286), contained dicta which caused Geoffrey Vos QC some difficulty. For example, Staughton LJ said that in his opinion more than one building could not be treated as comprised in premises for the purposes of the Act. Geoffrey Vos QC pointed out, however, that this opinion was qualified by the phrase 'in the ordinary way'. Unlike the case before him, the structures making up the estate were separate in a meaningful sense. They were not part of the same development built at the same time. He accepted that his decision was inconsistent with some of the reasoning in *Kay Green's* case, but thought that it did not conflict with the ratio decidendi.

[17.37] In reaching his decision, Geoffrey Vos QC adopted the approach suggested by Hobhouse LJ in the *Belvedere Court Management* case. Sections 5 and 5A, he said, are secondary rather than substantive, in the sense that they are part of the machinery of the legislation. But they are an essential part of the mechanics, rather than being merely supportive of other provisions. Their mandatory provisions, therefore, cannot be disregarded. Section 5(3) in mandatory terms requires a landlord who proposes to effect a transaction involving more than one building to sever the transaction so as to deal with each building separately. Adopting a purposive construction, Geoffrey Vos QC said that the purpose of the legislation is to give tenants the right to acquire their landlord's reversion. In order to achieve that object the legislature must be taken to have intended to create a workable procedure, but to construe 'building' as including a 'building scheme', as suggested in the *30 Upperton Gardens* case, would be artificial and would cross the boundary between construction and legislation; moreover, it would give rise to difficulties of interpretation. However, he continued, 'building' must have been intended by Parliament to include more than one structure in some, albeit limited circumstances. To make sense of the Act, the word 'building' must be construed to mean either a single building or one or more buildings, where the occupants of the qualifying flats in each of those buildings

share the use of the same appurtenant premises. On this construction some, but not all, building schemes will come within the Act. On the facts, the occupants of the qualifying flats shared the use of the same appurtenant premises and the notice accordingly complied with the provisions of ss 5 and 5A of the Act and was a valid notice.

[17.38] In the light of his decision on the meaning of 'building' it was unnecessary for Geoffrey Vos QC to consider the argument on the Human Rights Act 1998, but his brief comments give it little support.

Homelessness – priority need

[17.39] *Hall v Wandsworth London Borough Council; Carter v Wandsworth London Borough Council* [2004] EWCA Civ 1740, [2005] 2 All ER 192 were heard together, both being cases raising issues relating to the review of decisions as to 'priority need' under the homelessness legislation. In each case the applicant claimed to be in priority need as being a person 'vulnerable as a result of ... mental illness'. Carnwath LJ, with whose judgment the other members of the court were content to agree, adopted the guidance given as to the meaning of this last phrase by the Court of Appeal in *R v Camden London Borough Council, ex p Pereira* (1988) 31 HLR 317, where Hobhouse LJ said (at 330):

'The council must consider whether Mr Pereira is a person who is vulnerable as a result of mental illness ... Thus, the council must ask itself whether Mr Pereira is, when homeless, less able to fend for himself than an ordinary homeless person so that injury or detriment to him will result when a less vulnerable man would be able to cope without harmful effect.'

The critical issue is risk of injury or detriment.

[17.40] After detailing the facts in the two cases, Carnwath LJ referred to reg 8(2) of the Allocation of Housing and Homelessness (Review Procedures) Regulations 1999, SI 1999/71 and the explanation given as to the scheme of the Housing Act 1996 and the regulations by Lord Bingham of Cornhill in *Runa Begum v Tower Hamlets London Borough Council* [2003] UKHL 5, [2003] 1 All ER 731 at [9](3) (discussed All ER Rev 2003 at [16.53], [18.43]). As it relates to the review procedure, reg 8(2) provides as follows:

'If the reviewer considers that *there is deficiency or irregularity in the original decision or in the manner in which it was made* but is minded nevertheless to make a decision which is against the interests of the applicant on one or more issues the reviewer shall notify the applicant—(a) that the reviewer is so minded, and the reasons why, and (b) that the applicant, or someone acting on his behalf, may make representations to the reviewer orally or in writing or both orally and in writing.' (Emphasis supplied by Carnwath LJ.)

The role of the reviewer is that of an administrator, not an independent tribunal.

[17.41] Carnwath LJ observed that one significant change made by the 1999 Regulations over the 1996 Regulations, which they replaced, was the addition of 'deficiency' in the italicised passage at [17.40] above. The most likely reason for the change, he suggested, was to reinforce the contrast between a defect in the decision itself and one in the manner in which it was made: in other words between the substance of the decision, and the procedure. In his opinion: 'the word "deficiency" does not have any particular legal connotation. It simply means "something lacking". There is nothing in the words of the rule to limit it to failings which would give grounds for legal challenge.' Regulation 8(2) applies not merely when the reviewing officer finds some legal or procedural error in the decision but whenever, looking at the matter broadly and untechnically, he considers that an important aspect of the case was either not addressed, or not addressed adequately, by the original decision-maker.

[17.42] In *Hall's* case the appeal was allowed for failure to comply with reg 8(2) under which Mr Hall should have been given advance notice of the proposed review decision and the reasons for it so as to enable him to make representations. In *Carter's* case the appeal was also allowed, but on the ground that the letter and statement of the reviewing officer taken together had not provided an adequate explanation of his conclusions, so as to show that the relevant issues had been lawfully considered. It was not necessary to consider the argument on reg 8(2) in her case, though Carnwath LJ said he would have been inclined to uphold the judge's conclusion on this issue.

[17.43] *R (on the application of Morris) v Westminster City Council* [2004] EWHC 2191 (Admin), [2005] 1 All ER 351 was the third occasion where Keith J had to deal with the matter before him. The essential facts, which were not disputed, were that the claimant and her daughter (aged three at the time of the first hearing on 13 October 2002 ([2003] EWHC 2266 (Admin), [2003] All ER (D) 202 (Oct)) arrived in the UK in April 2002 and were given leave to remain as visitors. They did not leave when the leave expired in June 2002, but the claimant successfully applied for a British passport on the basis that she was a British citizen by descent. It was thought that the daughter was not eligible for British citizenship, and that she remained a citizen of Mauritius alone.

[17.44] At first, the claimant and her daughter lived with relatives, but in August 2002 the relatives refused to let them stay any longer. The claimant applied to the defendant, Westminster City Council (the council) for accommodation under Pt VII of the Housing Act 1996, which relates to homelessness. The application was refused by the council. In general, homeless persons are regarded as having a priority need for accommodation if they have dependent children living with them. However, s 185 of the 1996 Act, as amended, provides:

'(1) A person is not eligible for assistance under this Part if he is a person from abroad who is ineligible for housing assistance.

(2) A person who is subject to immigration control within the meaning of the Asylum and Immigration Act 1996 is not eligible for housing assistance unless ...

(4) A person from abroad who is not eligible for housing assistance shall be disregarded in determining ... whether another person ... (b) has a priority need for accommodation.'

It was common ground that the daughter fell within s 185(2), since she was to be treated as coming from abroad. Keith J, on the first hearing, agreed with the council's argument that the effect of s 185(4) was that the daughter must be disregarded in determining whether the claimant has a priority need for accommodation. Applying the ordinary canons of statutory construction, the claim on that basis must fail.

[17.45] On the first hearing Keith J then turned to consider the human rights argument, namely whether the above construction of s 185 prevented the claimant and her daughter from being able to enjoy their right to respect for their home and their family life under art 8 of the European Convention on Human Rights (ECHR) in the way that other people could. This, he said, raised three issues:

- (i) The discrimination issue. Did the council's refusal to treat the claimant as having a priority need for accommodation in circumstances where a parent with a dependent child who was not subject to immigration control would have been treated as having a priority need for accommodation amount to an infringement of her right under art 14 of the ECHR, which provides that the enjoyment of the rights set forth in the convention shall be secured without discrimination 'on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'?
- (ii) The construction issue. If the answer to (i) is 'yes', is it possible for s 185(4) to be read and given effect in a way which is compatible with the right guaranteed by art 14 as required by s 3(1) of the Human Rights Act 1998 (HRA)?
- (iii) The declaration issue. If not, and if s 185(4) is therefore incompatible with the right guaranteed by art 14, should the court make a declaration of that incompatibility as permitted by s 4(2) of the HRA?

[17.46] Keith J did not think it appropriate to address these issues until due notice had been given to the Crown. This was done and the First Secretary of State decided to intervene. At the second hearing on 26 May 2004 ([2004] EWHC 1199 (Admin), [2004] All ER (D) 389 (May)) the court was apprised of very significant changes in the factual position. The daughter had become registered as a British subject on 12 June 2003 and was accordingly no longer subject to immigration control. In these changed circumstances the claimant had been in priority need for accommodation since then, and on the assumption that her application

for accommodation would be decided on that basis, she no longer needed a remedy for herself. Moreover, her financial circumstances had improved so that she no longer needed to rely on the public sector for assistance with her housing needs and those of her daughter.

[17.47] In the light of the changed circumstances, Keith J at the second hearing had to decide whether it was appropriate to permit the proceedings to continue when the claimant no longer needed a remedy for herself. The decision on this did not raise any landlord and tenant points and will not be further considered here. 'Not without hesitation', he decided that the proceedings should continue, applying the considerations set out in *R (on the application of Quintavalle) v British Broadcasting Corp* (1998) 10 Admin LR 425. It is these further proceedings which are reported in the All England Reports.

[17.48] In these further proceedings Keith J discussed the three issues he had identified in the first hearing and which are set out at [17.45] above. On the discrimination issue he adopted the approach of Brooke LJ in *Wandsworth London Borough Council v Michalak* [2002] EWCA Civ 271, [2002] 4 All ER 1136 (noted All ER Rev 2002 at [15.14], [17.78]–[17.88], [25.10]), who said that the court should ask itself four questions: a negative answer to any one meant that the claim was likely to fail rendering it unnecessary to proceed to the following questions. To this a fifth question has been added, to be interposed between the original questions (ii) and (iii): see *R (on the application of Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin), [2002] 3 All ER 994 (noted All ER Rev 2002 at [15.12], [15.13]). With this addition, the questions are:

- (i) Do the facts fall within the ambit of one or more of the substantive provisions (for the relevant Convention rights see s 1(1) of the HRA 1998)?
- (ii) If so, was there different treatment as respects that right between the complainant on the one hand and other persons put forward for comparison ('the chosen comparators') on the other?
- (iii) If so, was the difference in treatment between the complainant and others put forward for comparison on one or more of the proscribed grounds under art 14?
- (iv) Were the chosen comparators in an analogous situation to the complainant's situation?
- (v) If so, did the difference in treatment have an objective and reasonable justification: in other words, did it pursue a legitimate aim and did the differential treatment bear a reasonable relationship of proportionality to the aim sought to be achieved?

Keith J considered each of these questions in turn.

[17.49] In relation to (i) Keith J said that it is well established in European jurisprudence that there does not have to have been a breach of one of the substantive articles of the Convention for art 14 to be engaged.

Further, art 14 can apply to rights which a state chooses to guarantee, even if it is not obliged to do so, provided they are in an area which falls within the ambit of one of the substantive rights in the Convention. In the instant case the substantive right relied on was art 8, which provides that 'Everyone has the right to respect for his private and family life, his home and his correspondence'. Keith J accepted the argument that the facts fell within the ambit of art 8 because the right for parents with dependent children to be provided with housing assistance was state intervention in an area falling within art 8, respect for family life.

[17.50] In relation to (ii) there was clearly a difference in treatment between the claimant and the chosen comparators who included an applicant for housing assistance who was a British citizen and who had a dependent child not subject to immigration control.

[17.51] In relation to (iii) Keith J did not accept arguments that the dividing line between those eligible for assistance under Pt VII and those who are not was long-term residence in the British Isles, not nationality. In his opinion the difference in treatment between the claimant and her chosen comparators was on one of the grounds prohibited by art 14 of the Convention, namely national origin.

[17.52] In relation to (iv) Keith J had no doubt that the claimant and the comparator referred to at [17.50] above were in analogous situations.

[17.53] In relation to (v) it was accepted that s 185 had the legitimate aim, *inter alia*, of discouraging persons from coming to the UK to claim benefits and services. The instant case, Keith J said, was only about s 185(4): he had, he continued, no reason to suppose that this section –

‘would deter persons who were not themselves subject to immigration control, ie British citizens, and who have dependent children abroad, from bringing them to the United Kingdom simply to render themselves eligible for housing assistance under Pt VII. If they bring their dependent children into the United Kingdom they do so because they want to live with them and provide for them here, not because the consequence of that would be that the British Citizen would be treated by s 189(1)(b) of the Housing Act 1996 as having a priority need for accommodation, but for the fact that that right is trumped by s 185(4).’

In his opinion, s 185(4) was not likely to achieve what it was intended to achieve. ‘If’, he concluded –

‘a particular measure which would otherwise be discriminatory is unlikely to achieve the result which it was intended to achieve, the difference in treatment between persons on the ground of their nationality which the measure produces can hardly be a reasonable and proportionate way of achieving that result.’

[17.54] In the light of his answers to the above five questions, Keith J held that the council’s decision amounted to an infringement of the claimant’s right under art 14 to enjoy her right to respect for her family

life under art 8 without discrimination. Section 185(4) could not be construed in a way which would make it compatible with art 14. Accordingly, he made a declaration that s 185(4) is incompatible with art 14 to the extent that it requires a dependent child of a British citizen to be disregarded when determining whether the British citizen has a priority need for accommodation, when that child is subject to immigration control. (See also [1.64] above.)

[17.55] *Cramp v Hastings Borough Council; Phillips v Camden London Borough Council* [2005] EWCA Civ 1005, [2005] 4 All ER 1014n, [2005] All ER (D) 483 (Jul) are primarily cases on practice and procedure but are worth a mention here because in the extract from the decision reported the court considered the application of the judgment of the Court of Appeal in *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60, [2005] 3 All ER 264 to second appeals from the county courts in homelessness cases, and the practice to be followed in appeals to the county court pursuant to s 204 of the Housing Act 1996 (see [19.21]–[19.23] below). Brooke LJ (with whom Arden and Longmore LJ agreed) made it clear that *Uphill's* case provided helpful guidance rather than laying down rigid rules. It did not put a fetter on the power of the Court of Appeal to put things right if it had occasion to believe that things were going wrong in an important way in the practical operation of the statutory scheme in Pt VII of the Housing Act 1996 (up to and including the appeal on a point of law to the county court). Reference was made to CPR 52.13 which provides that the Court of Appeal will not give permission to appeal from a decision of a county court or the High Court which was itself made on appeal unless, inter alia, it considers that '(a) the appeal would raise an important point of principle or practice'. Brooke LJ said that there was a worrying tendency for county court judges –

'to overlook the fact that it will never be easy for a judge to say that an experienced senior housing officer on a homelessness review ... has made an error of law when she considered that it was unnecessary to put in train further detailed inquiries ... before she could properly make a decision on the review. The need to correct that tendency raises an important point of practice. The duty to decide what inquiries are necessary rests on her, and her decision will be a lawful decision unless no reasonable council could have reached the same decision on the available material.'

[17.56] Brooke LJ also referred to the practice to be followed in appeals to the county court pursuant to s 204 of the 1996 Act, which is governed by CPR 52. This in effect provides that the county court judge should not normally receive oral evidence or evidence which was not before the senior housing officer on the review. Accordingly, he continued, judges:

'... need to be astute to ensure that evidential material over and above the contents of the housing file and the reviewing officer's decision is limited to that which is necessary to illuminate the points of law that are to be relied on in the appeal, or the issue of what, if any, relief ought to be granted.'

He added that the notice of appeal should set out the grounds of appeal in some detail; and that the bundle of documents should be restricted to those documents which are reasonably necessary to enable the appeal court to come to a decision.

Protection from Eviction Act 1977

[17.57] In *Rogerson v Wigan Metropolitan Borough Council* [2004] EWHC 1677 (QB), [2005] 2 All ER 1000 the appellant and his partner were on 19 November 2002 allowed by the respondent housing authority into the occupation of Flat 11 in pursuance of the authority's duty under s 188 of the Housing Act 1996 to provide accommodation pending its decision as to whether it had a duty to house them. The flat was in premises used as a hostel, with a warden in the ground floor flat who had access to all the accommodation in the premises. The premises had originally been a block of flats, mostly two-bedroomed flats with a living room, bathroom, toilet and kitchen. The appellant was allocated one of the bedrooms (with an individual lock) in a two-bedroom unit and the right to share the rest of the unit with anyone who happened to be in the other bedroom.

[17.58] The allocation was incorporated in a licence agreement which expressly provided that the appellant could be moved from one unit to another at the will of the respondent, and could be required to share the unit (other than the bedroom) with a stranger. He was not, as it happened, required to share during his occupation, but this was accepted to be irrelevant as he could have been so required at any time. He was also required to abide by hostel rules, which included a nightly curfew and a prohibition against bringing any alcohol or drugs on to the premises. The licence was terminable on seven days' notice.

[17.59] On 30 November 2002 the appellant and his partner were informed that the housing authority accepted that it had a duty under s 193 to house them, and said that they would be offered accommodation as soon as there was a suitable vacancy. However, following allegations that they had failed to comply with the conditions of the licence, the appellant and his partner were given notice to quit on 7 February 2003 to expire on 17 February. When the notice to quit expired they were evicted without a court order. In the proceedings the claimant alleged that he was entitled to receive four weeks' notice followed by an order for possession pursuant to the Protection from Eviction Act 1977. That Act, it will be recalled, applies, *inter alia*, to premises let as a dwelling under a licence which is not an 'excluded licence' within s 3A, added by the Housing Act 1988. Subsection (8) of that section excludes a licence which confers rights of occupation in a hostel, within the meaning of the Housing Act 1985, provided by one of the public bodies specified, which includes a district council such as the respondent. By s 622 of the 1985 Act a hostel is defined as including '... a building in which is provided, for persons

generally or for a class or classes of person ... residential accommodation otherwise than in separate and self-contained sets of premises ...'

[17.60] The effect of the provisions referred to in the previous paragraph was that the 1977 Act would not apply if the premises were a hostel, and this issue was accordingly dealt with first. The county court judge had held that they were, and Elias J observed that the question on the appeal was whether there was a proper factual basis on which a judge could reach the conclusion that the appellant was being accommodated in a hostel. The answer turned on the answer to be given as to the proper meaning of the concept of a separate and self-contained set of premises. This could not, Elias J said, simply mean physically separate and self-contained, for two reasons. First, residential accommodation provided in self-contained premises must perforce be physically separated from the rest of the block of accommodation. So, he concluded, the meaning of 'separate' must be directed to some other aspect. Secondly, the notion of separate accommodation more naturally refers to accommodation which is separate for each person (with or without a partner). It is not appropriate to describe someone as being in separate accommodation if they are being compelled to share some of the facilities with someone they have not chosen. This, Elias J said, is supported by *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 All ER 46 (discussed All ER Rev 2002 at [17.15]–[17.22]) and also by *Brennan v London Lambeth Borough Council* (1997) 30 HLR 481, which had been strongly relied on by the county court judge. Elias J accordingly affirmed the decision of the court below, which he thought reflected the policy behind the legislation, which was intended to preserve a certain flexibility to enable public bodies such as the district council to act in the public interest.

[17.61] In view of the decision on the first issue, the appeal inevitably failed, but Elias J nevertheless considered the alternative argument, which had been accepted at first instance, that the accommodation provided for the appellant was not a dwelling and therefore fell outside the 1977 Act. In so deciding the first instance judge had relied on *Mohamed v Manek* (1995) 94 LGR 211, CA. That case is authority for the proposition that if a person such as the appellant has only been given a licence to remain pending the decision about his right to be housed, then it would be clear that the accommodation provided for him for that brief temporary period would not constitute his dwelling. The judge, Elias J said, had gone wrong in focusing on the original purpose for which the accommodation had been provided. He should have considered the nature of the residence at the time the notice to quit was given. It was plainly the council's intention that the appellant and his partner should occupy the premises until a suitable vacancy arose. Whatever the original intention may have been at the date of the notice, it could not be said that the provision of the accommodation was so transient as to prevent it from being described as the appellant's dwelling.

Without notice orders for possession and anti-social behaviour injunctions under the Housing Act 1966

[17.62] In *Moat Housing Group South Ltd v Harris* [2005] EWCA Civ 287, [2005] 4 All ER 1051 the second appellant, Susan Hartless, had been the tenant under an assured tenancy from the claimants, Moat Housing Group South Ltd (Moat), who are registered social landlords, since May 2001 and occupied the premises with her four children, whose ages ranged, on 29 October 2004, between 6 and 14 years. She was estranged from the first appellant, Carl Harris, the father of the children, but he often visited the family at their home. Ms Hartless had never received any notice or other warning from Moat that her behaviour, or the behaviour of Mr Harris or her children, was such that her family might be at risk of being evicted from their home. As Brooke LJ, giving the judgment of the court said, it was therefore 'an enormous surprise for her when representatives of her landlords called at her house without prior notice at about 9 pm [on the evening of 29 October 2004], accompanied by police and a television cameraman'. They served on her a badly drafted order in effect requiring her, inter alia, to vacate her home from a time some three hours before the order was served, to leave the neighbourhood, not to engage in specified anti-social behaviour or to contact specified persons and to exercise reasonable parental control over her children. A second order attached a power of arrest. These orders had been obtained in 'without notice' proceedings earlier on the same day. The applications to the court had been made under ss 153A, 153C and 153D of the Housing Act 1966, inserted into that Act by s 13 of the Anti-Social Behaviour Act 2003, which introduced anti-social behaviour injunctions (ASBI) and was brought into force only in June 2004. Orders in identical terms were served on Mr Harris, though the report does not say when.

[17.63] The police, not surprisingly, were reluctant to see the orders complied with immediately. There seems to have been some contact with Mr Harris, for the report says that 'the appellants' were advised to contact a solicitor, and they were, as Brooke LJ said 'lucky enough' to find one who was prepared to come out to see them at once. She, in turn, got in touch with a High Court judge who, at 1.30 am the following morning, stayed the effect of the ouster and exclusion parts of the orders until the matter could be considered on notice in the county court the following week.

[17.64] Much of the report comprises details of the evidence, but for present purposes we will concentrate on the general principles stated, or restated, by the Court of Appeal. First, Brooke LJ restated the principles applicable to intrusive without notice orders, observing that it was hard to envisage a more intrusive 'without notice' order than one which requires a mother and her four young children to vacate their home immediately. He referred to the family law jurisdiction where the relevant principles were condensed and codified by s 45 of the Family Law Act 1996 which provides in sub-s (2):

'In determining whether to exercise its powers [to make an occupation order or a non-molestation order without notice] under subsection (1), the court shall have regard to all the circumstances including—(a) any risk of significant harm to the applicant or a relevant child, attributable to conduct of the respondent, if the order is not made immediately ...'

It would, he said, be best if judges in the county courts should follow this guidance when deciding whether to exercise their discretion to make an ASBI without notice. They should, he continued (at [72]), bear in mind:

'(1) that to make an order without notice is to depart from the normal rules as to due process and warrants the existence of exceptional circumstances; (2) that one such exceptional circumstance is that there is a risk of significant harm to some person or persons attributable to conduct of the defendant if the order is not made immediately; (3) that the order must not be wider than is necessary and proportionate as a means of avoiding the apprehended harm.'

Applying these principles to the facts of the case it would have been properly within the scope of the district judge's discretion to have made a non-molestation order prohibiting contact with potential witnesses in reasonable fear of significant harm before the application could be heard on notice if such an order were not made; likewise, to have made ASBI orders and directions that they should exercise reasonable parental control over two of the children where there was evidence of bad behaviour. Moreover, she was entitled to attach a power of arrest to that part of the order which protected people from violence. However, it was not within the scope of her discretion to make an ouster order or an exclusion order without notice. This was neither necessary nor proportionate to the harm sought to be avoided.

[17.65] At the end of November 2004 the matter came before the district judge in a five-day trial. He found that there was clear evidence of breaches of cl 12(b) of the tenancy agreement (terms relating to causing a nuisance or annoyance, and harassment) and of grounds 12 (breach of term of tenancy) and 14 (nuisance or annoyance) in Sch 2 to the Housing Act 1988. He went on to find that it was reasonable to make a possession order, and that it should not be suspended. He also held that the grounds for making an ASBO against both appellants were satisfied. He said that such an order was necessary to protect the residents and visitors to the estate.

[17.66] The grant of an immediate possession order was challenged on three grounds: (1) that the judge erred in his admission and treatment of extensive hearsay evidence. In rejecting this challenge the court said, however, that in future more attention should be paid by claimants in this sort of case to the need to state by convincing direct evidence why it was not reasonable and practicable to produce the original maker of the statement as a witness. (2) That the judge was wrong to consider it reasonable to make a possession order in all the circumstances of the case.

The judge had gone straight to s 9A(2) of the 1988 Act inserted by s 16(2) of the 2003 Act which provides that where a court is considering whether it is reasonable to make an order for possession on ground 14 it

‘... must consider in particular—(a) the effect that the nuisance or annoyance has had on persons other than the person against whom the order is sought; (b) any continuing effect the nuisance or annoyance is likely to have on any such persons; (c) the effect that the nuisance or annoyance would be likely to have on such persons if the conduct is repeated.’

Brooke LJ pointed out that although s 9A uses the words ‘in particular’, this does not mean that the court is not bound to take account of all relevant considerations. He accepted that the judge had failed to take certain matters into account, but nevertheless refused to disturb the judge’s finding. He did not consider that these matters could properly outweigh the seriousness of the conduct exposed in the judgment so as to make it not reasonable to make the order. (3) That the judge should have suspended the order. On this point the court said that it would be right to suspend the possession order on terms that there are no further breaches of cl 12(b) of the tenancy agreement and no nuisance or annoyance caused by anyone living in or visiting the premises. The precise terms were to be settled later. The reasons for the suspension included the effect of the events of 29 October, the fact that Mr Harris, who might exercise control over the children, had returned to live on the premises, the good school reports of the children and the absence of any criminal records or any record of serious police involvement with the family. It is not entirely clear why it should also have been thought important that the next door family, ‘who by almost common assent behaved considerably worse than the Harris family’, had left the estate, never to return.

[17.67] At the same time as the possession order was made on 3 December 2004, ASBOs under the Crime and Disorder Act 1998 were made against the appellants of four years’ duration, a period which was said to be clearly wrong. The court accepted the argument that ASBOs were in any case inappropriate. They were set aside and there were substituted undertakings (or ASBIs to like effect) without limit of time which should serve to control the conduct of the appellants and their control over their children while either of them were still resident in or a visitor to the estate. The precise terms of the undertaking (or ASBI) were to be settled later.

Medical Law

VIVIENNE HARPWOOD, LLB

Barrister, Professor of Law, Cardiff Law School, Cardiff University

[18.1] Medical law is a wide-ranging subject, and an interesting variety of medical law cases appeared in the All England Law Reports during the year 2005, covering topics that included causation, consent to treatment, clinical negligence, mental health law, professional discipline and human genetics. Almost all the reported cases with a strong focus on medical law are covered in this Annual Review, but space constraints mean that only the more significant of the cases are discussed in detail. Cases dealt with in All England Direct, the online service, are also referred to where relevant. Many cases which properly belong to other legal subjects, such as civil procedure or criminal law, coincidentally contain references to medical law. These are not discussed here, as they are explored in the chapters relating to those particular areas of law.

Causation

Loss of a chance in the context of clinical negligence

[18.2] A definitive decision on the question of 'loss of a chance' in the context of clinical negligence has been awaited for some time, indeed ever since the question was left unanswered by the House of Lords in *Hotson v East Berkshire Health Authority* [1987] 2 All ER 909. The House of Lords finally published its decision on this important issue in *Gregg v Scott* [2005] UKHL 2, [2005] 4 All ER 812 (also discussed at [28.13]–[28.17] below). The concept of loss of an opportunity has long been recognised in the law of contract (*Chaplin v Hicks* [1911] KB 786, [1911–13] All ER Rep 224), and in other areas of the law of tort (*Spring v Guardian Assurance plc* [1994] 3 All ER 129), as a valid basis for compensation. *Gregg v Scott* is an interesting case for a variety of reasons. Not least, it offers insights into current thinking of the most senior members of the judiciary on some important policy issues.

[18.3] The facts of the case were as follows. The appellant found a lump under one of his arms, and consulted Dr Scott, the respondent. Dr Scott made a negligent diagnosis of a benign collection of fatty tissue. However, the lump was still there a year later, and the appellant consulted another GP who promptly referred him to hospital for diagnostic tests. Cancer of a lymph gland (non-Hodgkin's lymphoma) was diagnosed, but unfortunately the appellant's condition had deteriorated because the cancer had spread, and he was in considerable pain. Although an initial

course of high-dose chemotherapy destroyed the cancer, he had a relapse some time later, and his prospects of survival were poor.

[18.4] The appellant contended that he should have been referred to the hospital when he had first consulted with Dr Scott, and that had cancer had been diagnosed at that stage he would have had a good chance of a cure. The arguments depended to a large extent on statistical medical evidence. In fact the deterioration in his condition as a result of the delayed diagnosis had reduced his prospect of disease-free survival for ten or more years from 42%, which it had been when he first consulted the respondent, to 25%, as it was at the date of the trial. The trial judge held that had the correct diagnosis been made, and treatment given promptly, he would probably have achieved remission without high doses of chemotherapy. Despite this, the claim was dismissed because the delay had not deprived the appellant of the prospect of a cure. The trial judge reasoned that at the time he was misdiagnosed the appellant had less than a 50% chance of surviving for more than ten years, and although his condition had indeed deteriorated by the time he was eventually treated, it was impossible to conclude on a balance of probabilities that if the respondent had not been negligent his patient's condition would have been any better, or that painful treatment would have been avoided. The judge based this conclusion on the reasoning of the House of Lords in *Hotson v East Berkshire Area Health Authority*, which had established the 49/51% 'balance of probabilities' rule to what would have happened but for the defendant's negligence.

[18.5] The Court of Appeal was asked to consider two arguments. First, whether, since the appellant had proved that the delay had caused him injury, he could be compensated, that compensation to cover the reduction in his chances of survival. Secondly, whether there was a compensable head of damage in its own right for the reduction in chances of survival or 'loss of a chance' in medical law. The Court of Appeal dismissed the appeal.

[18.6] The appellant placed the same arguments before the House of Lords. He argued that no novel question concerning damages for a loss of chance arose in this case at all. There had been a breach of duty in the negligent diagnosis, and that breach of duty had caused a loss. The only matter in issue was the value of the claim, and in the context of quantification of damages, compensation for loss of a chance was not unusual. The second argument was that a lost chance was real loss and should be recognised as such by the law

[18.7] By a three to two majority, the House of Lords held that even if the quantification of future losses was decided on the basis of an evaluation of risks and chances, it would still be necessary for the appellant to prove that the loss he had sustained was consequential on injury caused by the respondent's negligence. The majority took the view that in this case it had not been shown that, on the balance of

probabilities, the delay in the commencement of treatment attributable to the respondent's negligence had materially affected either the course of the illness, or the appellant's prospects of survival, which had never been as high as 50%. Liability for the loss of a chance of a more favourable outcome should not be introduced into personal injury claims. Lord Nicholls and Lord Hope, who dissented, were of the opinion that the significant reduction in the prospects of a successful outcome that had been caused by the respondent's negligence was a loss for which he was entitled to be compensated. Accordingly, the appeal was dismissed.

[18.8] This case, in common with others recently decided by the House of Lords, is concerned with the tensions between a strict application of the law and the need to achieve individual justice. In the view of the majority, justice could best be achieved by ensuring that certainty prevailed in the law. The minority view was that this was one case in which certainty should give way to the demands of what they considered to be justice for the individual concerned. The majority feared that a departure from the long-established rules of causation in medical cases, by allowing the introduction of analysis in terms of loss of a chance would result in the relaxation of crucial control mechanisms, and fear of the opening of the proverbial floodgates to a large number of claims was no doubt an influential factor. The traditional test for causation, based on the balance of probabilities, is useful when past facts are under consideration. However, it is less practical when the courts are concerned with future prospects. It is when dealing with future prospects that the courts have been prepared to substitute the concept of loss of a chance, especially in the context of quantifying damage. This approach is, however, difficult to apply when hypothetical medical issues are under consideration.

[18.9] *Chester v Afshar* [2004] UKHL 41, [2004] 4 All ER 587, another majority decision (see All ER Rev 2004 at [18.3]–[18.22], [28.17]–[28.23]), was decided by the House of Lords only a few months before *Gregg v Scott*. That was widely regarded as a ground-breaking decision in which the House of Lords was prepared to sacrifice legal logic to wider policy considerations. However, in *Gregg v Scott*, the reverse was the case, the majority deciding in favour of the strict application of established principles of law. In *Chester v Afshar* the House of Lords modified long-established principles and by-passed the conventional rules of the law of tort dealing with proof of causation. In both these cases policy issues were openly discussed at some length. Another bold and controversial exception to the conventional rules of causation was created by the House of Lords in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2002] 3 All ER 305, though that exception was restricted by a large number of qualifications.

[18.10] Lord Hoffmann, who had dissented in *Chester v Afshar* in favour of adhering to established legal rules, was in the majority in

Gregg v Scott, and rejected the argument that the courts should be permitted to take into account possibilities that do not amount to probabilities. In his view, such an approach would only be appropriate in cases where damage is proved to have been attributable to the respondent's wrongful act. *Gregg v Scott* did not fall into that category. Lord Hoffmann rejected the argument that 'loss of a chance' should be a recoverable head of damage in clinical negligence cases, confirming the approach in *Hotson* and in *Wilsher v Essex Area Health Authority* [1986] 3 All ER 801. Paradoxically, he concluded that the exception created in *Fairchild* actually strengthened the conventional rules, and that it was not relevant to this case because it was confined to its own narrow set of facts. He rejected the view that the present rules dealing with causation in clinical negligence cases were too restrictive of liability, and spoke strongly against abandoning a substantial body of authorities and dismantling the many qualifications and restrictions with which the House of Lords had so recently hedged the *Fairchild* exception. He was also extremely wary of introducing into the law in this area the same sort of artificial control mechanisms that characterised the current law on psychiatric injury, making the boundaries of liability a fertile area for litigation, and proposed that any change in the law should be a matter for Parliament.

[18.11] Lord Phillips outlined the policy issues implicit in the case, and examined the practical consequences that would inevitably follow any change in the law, paying detailed attention to the expert medical and statistical evidence. A very real difficulty arose in the *Gregg* case because the patient's condition at the time of the negligence was only identified on a balance of probabilities. Medical opinion was unable to predict with certainty what the prognosis would have been if the negligence had never happened.

[18.12] Baroness Hale, also dismissing the appeal, acknowledged that the appellant's approach was based on policy, and examined the arguments for dealing with this case in common sense terms. She rejected a formulation of compensable damage in terms of 'loss of a chance' for fear that such an approach could lead to liability in almost every case, and would undermine the doctor-patient relationship. However, she did express disquiet about the creation of different rules for different types of negligence, making this very valid point (at [218]):

'why should my solicitor be liable for negligently depriving me of the chance of winning my action, even if I never had a better than evens chance of success, when my doctor is not liable for negligently depriving me of the chance of getting better, even if I never had a better than evens chance of getting better? Is this another example of the law being kinder to the medical profession than to other professionals?'

Despite recognising this difficulty, she concluded that there is a valid counter-argument that it is permissible to distinguish between personal

injury and financial loss. She considered that personal injury litigation would increase in complexity if the dissenting view were to prevail, and opposed the inevitable increase in the use of complex expert evidence, with resulting longer trials and negotiations, and unpredictable outcomes of litigation.

[18.13] Lord Nicholls rejected the policy arguments relied upon by the majority, and summed up his views with the memorable words (at [43]):

‘It cannot be right to adopt a procedure having the effect that, in law, a patient’s prospects of recovery are treated as non-existent whenever they exist but fall short of 50%. If the law were to proceed in this way it would deserve to be likened to the proverbial ass.’

Lord Nicholls’s analysis of the prevailing approach to causation when there has been a lost opportunity is the clearest. At start of his speech (at [3]), he described the reality of what had happened from the patient’s perspective:

‘The loss of a 45% prospect of recovery is just as much a real loss for a patient as the loss of a 55% prospect of recovery. In both cases the doctor was in breach of his duty to his patient. In both cases the patient was worse off. He lost something of importance and value. But, it is said, in one case the patient has a remedy, in the other he does not.’

Drawing on cases concerning material losses in tort, he explained that what the court measures on a balance of probabilities as actionable damage is the opportunity lost to the claimant rather than the outcome that he desired. He commented that the problem faced by the courts in this case was how to deal with this situation in the context of clinical negligence, when the precise outcome of many medical conditions is beyond the control of any individual, and is difficult to predict, despite major advances in medical science. There are obvious imponderables in such cases, such as the way in which each individual responds to particular forms of treatment, which cannot be assessed by statistical evidence alone. His view was that justice demands that the legal rules should be framed in such a way as to match medical reality, because the very purpose of imposing a duty of care on a doctor is to promote the patient’s prospects of recovery by the exercise of care and skill:

‘The law would rightly be open to reproach were it to provide a remedy if what is lost by a professional adviser’s negligence is a financial opportunity or chance but refuse a remedy where what is lost by a doctor’s negligence is the chance of health or even life itself. Justice requires that in the latter case as much as the former the loss of a chance should constitute actionable damage.’ (at [25])

Citing *Fairchild* as a recent example of judicial flexibility to achieve a just solution, Lord Nicholls called for a similar approach in this case, distinguishing it from *Hotson*, and pointing out that Lord Bridge had predicted in that case that there may be cases, especially those involving medical negligence, when a court can only measure statistical chances.

That had not been necessary in *Hotson*, where there was no real uncertainty about what would have happened if there had been no negligence. Lord Nicholls dismissed the ‘floodgates’ argument as an invalid reason for allowing injustice to pass unremedied, arguing that it would be possible to restrict any new approach to clinical negligence claims by placing explicit limitations on the scope of liability. Another policy objection that Lord Nicholls rejected was the claim that an extension to the existing law would place too great a burden on NHS resources. The government, he reasoned, could introduce legislation to deal with the problem of NHS litigation. Finally, he rejected the argument that wasteful defensive practices would be adopted by doctors if the case was decided in favour of the appellant. He reached a pragmatic conclusion (at [42]), based on the reasonable expectations of patients:

‘A patient should have an appropriate remedy when he loses the very thing it was the doctor’s duty to protect. To this end the law should recognise the existence and loss of poor and indifferent prospects as well as those more favourable.’

[18.14] Lord Hope, who also dissented, agreed with much of what Lord Nicholls said. He observed that the key to the decision in this case lay in the means by which the cause of action was identified. To describe it as a claim for ‘loss of a chance’ might have been appropriate if this had been a claim for economic loss, but here something quite different was a stake – physical injury, loss and damage caused by a delay in diagnosis. The claim for a reduction in the prospect of a successful outcome was simply one element among several resulting from a single cause, the enlargement of the tumour, and there was an analogy with cases in which a person’s promotion prospects have been reduced as a result of a physical injury.

[18.15] The study of law is seldom as invigorating as when high level judicial activism driven by policy is in evidence. Despite the cautious approach of the majority in *Gregg v Scott*, there remains some scope for further development in favour of claimants in relation to other aspects of clinical negligence claims. However, this case will end any speculation that there may be room for radical developments in the law of clinical negligence in the context of causation.

Consent to medical treatment

[18.16] Some of the most controversial cases in medical law are those in which judges are called upon to make difficult decisions concerning consent when the patient lacks competence, and the relatives and doctors cannot agree about medical treatment. This is an area in which judges are sometimes faced with challenging ethical dilemmas, and they are in an unenviable position, as their decisions involve life and death issues, and the best interests of the patient are not always clearly identifiable. It is only in those rare instances when there is an intractable dispute between

the parties, or some doubt on the part of medical staff as to what would be in the best interests of the patient, that cases involving these crucial issues come before the courts. Inevitably, many of these cases attract the attention of the media.

Treatment decision involving a seriously ill infant

[18.17] In the case of Charlotte Wyatt the parents of a seriously ill baby made extensive use of the media in attempts to engage the sympathy of the general public, at the same time forfeiting the time-honoured right to anonymity which would have been available to Charlotte. The case had intensive exposure before the courts within a relatively short time scale, and the history of the litigation is of some interest. Charlotte had been born prematurely in a hospital for which Portsmouth NHS Trust was responsible. She was profoundly brain-damaged. Her lungs and kidneys were badly affected, and her quality of life was very poor at the time of the first hearing, as she appeared to be blind, deaf and in great pain. Her neurological condition was described as being 'as bad as it could be'. Charlotte's parents and the doctors responsible for treating her could not agree about what treatment would be in her best interests if, as was probable, she contracted a respiratory infection over the course of the winter.

[18.18] The case first came before Hedley J in 2004 (*Portsmouth NHS Trust v Wyatt* [2004] EWHC 2247 (Fam), [2004] All ER (D) 89 (Oct)), when doctors treating Charlotte feared a crisis in her medical condition during the course of the winter. They did not consider that it would be appropriate to wait until an emergency situation arose before applying to the court for assistance. The clinical team favoured an approach that would permit gentle methods of ventilation, but they did not support the use of aggressive forms of ventilation, as the evidence suggested that these would be very painful for Charlotte and might damage her lungs still further without resulting in any real benefit. Her parents, however, who were deeply attached to their baby, wanted the medical team to do everything possible to save her life, should she become seriously ill with an infection. Hedley J, who like the parents is a committed Christian, granted an order to the effect that, as artificial ventilation or similar aggressive treatment would not be in Charlotte's best interests, a decision by Charlotte's doctors not to ventilate her, in the event that she acquired a serious infection, would not be unlawful.

[18.19] In April 2005, after Charlotte had survived the winter without an infection, her parents asked the same judge to cancel the original order, on the basis that her condition was much improved. Hedley J refused to do so after giving careful consideration to updated medical evidence about Charlotte's condition and prognosis. He found that there had been no significant change in her underlying condition and that Charlotte remained very ill. Her parents believed that Charlotte was able to respond

to them, and argued that, in the event of respiratory collapse, the hospital should attempt aggressive invasive treatment; and also that any decision as to withholding of aggressive treatment should wait until the onset of a crisis. Hedley J held that the views of the parents should be given great respect and proper weight, but were not decisive. All the medical experts involved, except one, agreed that essential treatment should be offered to Charlotte, as long as it did not involve invasive intensive care. His Lordship was of the view that the majority medical opinion must prevail, and that it would not be in her best interests to die in the course of painful, futile and aggressive treatment. Should she suffer a respiratory collapse, Charlotte should be given all treatment up to, but not including, intubation and ventilation. He explained that it was necessary to strike a balance between preserving parental decision-making on the one hand, and on the other the need to avoid an application to the court at a time of crisis. He considered that it would be wholly contrary to Charlotte's best interests for such a crisis to be overshadowed by a major legal conflict between her parents and the trust. Although he refused to lift the previous orders at that point, he did direct that the case be reviewed after six months to consider whether the declarations should be continued.

[18.20] Charlotte's parents challenged this decision in the Court of Appeal in August 2005, arguing that Hedley J had been in error. Although a decision was announced in August, the judgment was not published until October 2005. The Court of Appeal (*Re Wyatt (a child) (medical treatment: continuation of order)* [2005] EWCA Civ 1181, [2005] All ER (D) 107 (Oct)) (see also [15.28]–[15.34] above) dismissed the appeal, deciding that Hedley J had been correct in his application of the law. This is an important ruling, as the Court of Appeal revisited and discussed extensively the idea of 'best interests' when applied in cases of this kind, explaining that it is a broad concept which involved consideration of the child's medical, social, family and other interests, and that although the 'intolerability test' used by the Court of Appeal on earlier occasions was relevant (see *Re J (a minor) (wardship: medical treatment)* [1990] 3 All ER 930), and had influenced the trial judge, it was not determinative of the issue. The Court of Appeal took the view that open-ended orders were far from ideal, but in this case it was understandable for such orders to be made. The matter was referred to the High Court for reconsideration, as there appeared to be a change in Charlotte's condition.

[18.21] The most recent chapter in the case unfolded in October 2005 when further consideration was given to Charlotte's plight. Hedley J ([2005] EWHC 2293, [2005] 4 All ER 1325) reached the conclusion that the previous order that he had made relating to artificial ventilation should be revoked. He stated that it was for the doctors treating Charlotte to act in her best interests, taking into account parents' wishes in so far as professional judgment and 'conscience' would permit. By the time of this hearing, the doctors who treated Charlotte agreed that there had been

certain changes in her condition. There had been some improvement in the condition of her lungs and limited progress in her neurological functions. There was also evidence which suggested that there were circumstances in which it might now be appropriate to ventilate Charlotte if she suffered respiratory distress. Hedley J emphasised that the treating physician was under no obligation to take orders from the family, and that he should always act in the best interests of the child,

[18.22] Hedley J held on this occasion that it was impossible in the light of the medical evidence to frame a conventional declaration to deal with the problems in this case. As he explained (at [40]):

‘Since it is not possible to frame a conventional declaration ... given the unanimous medical evidence both on the issue of whether to ventilate, and also on when to withdraw ventilation, clearly the court can only grant a declaration, were it to do so, in a wholly novel form whereby it commits a treatment veto to the treating clinician. Whilst I am not saying that it might never be right to grant such an order, the court should hesitate long before so doing.’

However, he took the view that the wishes of Charlotte’s parents should be accommodated only in so far as professional judgment and conscience would permit, but no further. Accordingly, no further declaratory relief was required and the original order no longer stood.

[18.23] Although this litigation is important in its own right, it is also significant because it provided the Court of Appeal with the opportunity to review and clarify the concept of ‘the best interests of a child’ in the context of the withholding of medical treatment. The Court of Appeal preferred a ‘balance sheet’ approach to the best interests issue. Although there was a strong presumption in favour of preserving life, this would be rebutted in circumstances when medical treatment would be futile. In any event, there is no obligation on doctors to provide treatment that would be futile. In future, courts should focus on best interests rather than the concept of intolerability, although the latter might be encompassed within the concept (*Re Winston-Jones (a child) (medical treatment: parent’s consent)* [2004] EWHC 2713 (Fam), [2004] All ER (D) 313 (Oct) applied).

[18.24] It is a matter of some concern that the reason for the original application to the court in 2004 was that doctors did not want to be faced with the difficulties involved in seeking an order of the court at a time of crisis during a medical emergency. It is not impossible for such an emergency to arise in Charlotte’s case even now, and if doctors and parents cannot agree about her treatment at that stage, the courts might again be called upon to settle the matter. This would be at a time of crisis when emotions run high. Doctors at St Mary’s Hospital in Portsmouth will have the final say in deciding what treatment is best for Charlotte should she contract a serious infection, but Hedley J did not preclude the possibility of further litigation in this case, concluding that he hoped and

the relationship of trust which was emerging between the parents and the doctor treating Charlotte would continue to develop, summing up the position in this way (at [42]):

‘It is said that cases like this have no winners, but here there is a chance that Charlotte may be the winner if her parents seize this opportunity constructively to build upon their trust and confidence in Dr “K” and the staff who have committed themselves in such exemplary fashion to her case.’

The medical team responsible for treating Charlotte was reminded by Hedley J that they owed their ultimate obligation to their patient, and that their ‘professional conscience’ was what mattered, rather than the wishes of her parents. That is, and always was, the legal position. All that has changed is that there is no order in place confirming that this is so.

Status of an interim declaration

[18.25] A case involving a patient who lacked the capacity to make a decision about medical treatment raised an interesting point concerning the status of an interim declaration, which could be regarded as a ‘contradiction in terms’, and presented some conceptual difficulties. The solution was to take a pragmatic approach to the problem.

[18.26] *NHS Trust v T (adult patient: refusal of medical treatment)* [2004] EWHC 1279 (Fam), [2005] 1 All ER 387 concerned an adult patient who lacked capacity and who was refusing medical treatment. T was suffering from a borderline personality disorder, and displayed alarming behaviour which included self-harm. She had a habit of blood-letting, which resulted in the reduction in her haemoglobin level to a life-threatening degree, so that she needed emergency blood transfusions. T had made an advance directive to the effect that should she experience a mental health crisis, she wanted to refuse blood transfusion treatment. The reasons she gave were that a transfusion would not supply a long-term solution for her and, more irrationally and bizarrely, that she believed her blood was evil and would contaminate any transfused blood that she received. When she was admitted to the claimant hospital she refused a blood transfusion and, as her condition was deteriorating, the hospital applied to the court.

[18.27] An emergency judge made an order providing, inter alia, for a transfusion to be administered, and directing the hospital to apply for directions. At the subsequent directions hearing the claimant sought an interim declaration authorising blood transfusion treatment for T should it become necessary to save her life or to avoid imminent danger to her health. T opposed the grant of such a declaration, and the court considered the view that an interim declaration was not known to the law, according to Court of Appeal authorities, and could not be granted. The question of T’s capacity arose, and the Official Solicitor drew the court’s attention to CPR 25.1(1)(b).

[18.28] Although the earlier authorities at Court of Appeal level suggested that an interim declaration could not be granted, and although the concept of an interim declaration raised some real conceptual difficulties, the judge held that the introduction of the power to grant an interim declaration by the Civil Procedure Rules meant that it was no longer unknown to the law. The judge took a sensible approach to the issues, ruling that:

‘There is obvious pragmatic force in seeking relief from the court which can be implemented as and when in the future an emergency arises in respect of Ms T which is the same, or essentially similar to those that have arisen in the past.’

[18.29] He placed great weight on the decision in the case of *St George's Healthcare NHS Trust v S*; *R v Collins, ex p S* [1998] 3 All ER 673, and acknowledged that it was extremely important for the patient to have the opportunity to make representations before any final declaration is made. However, when the balance of the competing factors came down heavily in favour of the administration of treatment that would save the patient's life, and as there was no uncertainty about her mental condition and its recurring nature, an interim declaration would be granted in this case.

Artificial ventilation: relevance of Bolam in determining best interests.

[18.30] In another case concerning the treatment of an incapacitated adult, *NHS Trust v A (adult patient: withdrawal of medical treatment)* [2005] EWCA Civ 1145, [2005] All ER (D) 07 (Sep), the Court of Appeal revisited the question of best interests concept in relation to an adult patient, and considered the relevance of the *Bolam* test in that context. Mr A was around 86 years of age, and he had a history of impaired renal function and myocardial ischaemic attacks of the brain. The prognosis was very poor as there was no hope of improving his underlying condition, and clinicians assessed that there was little likelihood of recovery. Accordingly, they concluded that it was in Mr A's best interests to withdraw all but palliative care. The family disagreed and the clinicians sought a declaration of the court relating to the legality of their proposed care plan. The case found its way to the Court of Appeal.

[18.31] It is not possible to discuss this case in detail here, but it is worth noting that the Court of Appeal agreed with the argument of the clinicians that since logically there can only be one ‘best interest’, and as the concept is wider than medical interests alone, it must be for the court to decide what is in a patient's best interests. There is no reason why a court is not entitled to weigh the evidence presented by both sides and to reject the evidence of one. The Court of Appeal agreed with a statement made by Dame Elizabeth Butler-Sloss P in *Re SL (adult patient: medical treatment)* [2000] All ER (D) 683, as follows:

‘In these difficult cases where the medical profession seeks a declaration as to lawfulness of the proposed treatment, the judge, not the doctor, has the

duty to decide whether such treatment is in the best interests of the patient. The judicial decision ought to provide the best answer not a range of alternative answers.’

[18.32] In Mr A’s case, the trial judge had taken great care in assessing the medical evidence, and had made it clear that if he had thought that there was medical opinion of even a 20% chance that some quality of life was realistic, he would not have granted a declaration. In the view of the Court of Appeal it could not be right to overlook the role of the judge in such cases by a simple application of the *Bolam* test. Waller LJ concluded:

‘If to a high degree of probability it is satisfied that the medical evidence demonstrates that it is in the patient’s best interests for the intrusive treatment to be withdrawn, then it is the duty of the court to say just that and hold that that is in the patient’s best interests. It is that duty that the judge performed.’

The Court of Appeal held that the judge had taken proper account of the religious and other concerns of the family, and had performed the correct balancing exercise when he had assessed the evidence. Accordingly, the application for permission to appeal was granted; and the appeal was dismissed.

Professional conduct issues

[18.33] The General Medical Council (GMC), the body responsible for disciplining doctors for breaches of their professional Code of Practice, has been subjected to a barrage of criticism over recent years. (See, for example, D Gladstone (ed), J Johnson, W G Pickering, B Salter and M Stacey *Regulating Doctors* (2000).) The two government-commissioned reports of greatest relevance to the GMC are the Final Report of the Bristol Royal Infirmary Inquiry (2001) and the Fifth Report of the Shipman Inquiry (December 2004). These two reports made a large number of criticisms of the GMC, and some important reforms had been made to the procedures for disciplining doctors even before the Fifth Shipman Inquiry Report was published.

[18.34] In *R (on the application of Campbell) v General Medical Council* [2005] EWCA Civ 250, [2005] 2 All ER 970 the Court of Appeal considered the practice of the GMC and, departing from two decisions of the Privy Council, introduced a crucial change to the law governing disciplinary proceedings against doctors. The decision is also important because, in the course of its deliberations, the Court of Appeal has endorsed and adopted recommendations made in the Fifth Shipman Inquiry Report.

[18.35] In the *Campbell* case the Professional Conduct Committee of the GMC (PCC) had found at a hearing held under the rules set out in SI 1988/2255 that Dr B, a consultant paediatrician who had single-handedly created a paediatric service on the Isle of Man, had

provided substandard and unsatisfactory treatment to two children. The PCC concluded that there was evidence that this was capable of amounting to serious professional misconduct. However, having made that finding, the PCC followed its usual practice of inviting the complainants to address them as to the circumstances, and then inviting the practitioner to address them 'by way of mitigation' (r 28(2)). Taking into account the mitigating circumstances and applying two Privy Council rulings on the matter, the PCC decided that in the light of several mitigating factors the doctor was not guilty of serious professional misconduct, commenting (at [24]):

'The Committee consider that the two cases about which it has heard evidence appear to be isolated incidents against a background of otherwise unblemished medical practice of over 30 years. They have also considered the outstanding testimonial that have been submitted on your behalf ... by your patients and colleagues, all of whom state that you are a highly committed, caring and professional doctor who cares deeply about your patients. In all these circumstances, the Committee have concluded that you are not guilty of serious professional misconduct.'

[18.36] The PCC accepted and adopted the submission of counsel for Dr B that in accordance with rulings made in two previous cases by the Privy Council, it was under an obligation to consider all relevant matters before reaching a finding of serious professional misconduct, and that mitigation did not merely affect the sanction to be imposed.

[18.37] The claimant applied for judicial review, and the judge ruled that the PCC had complied with its obligations to give reasons. On appeal to the Court of Appeal, the claimant argued that the PCC had been in error to attach weight to evidence that was solely relevant to personal mitigation when arriving at its decision on serious professional misconduct on the part of the practitioner. Rule 28 required the PCC to invite submissions and evidence 'as to the circumstances leading to those facts, the extent to which such facts are indicative of serious professional misconduct, and as to the character and previous history of the practitioner'. The Committee is required to invite the practitioner to 'address the committee by way of mitigation'. Rule 29 expressly required the PCC to take these matters into account when determining the issue of serious professional misconduct. Although such an approach would be inappropriate in a criminal trial, the wording of these rules has been interpreted over many years to mean that the PCC should take into account personal mitigation when deciding whether a practitioner has been guilty of serious professional misconduct. That interpretation was confirmed by the Privy Council in *Silver v General Medical Council* [2003] UKPC 33, [2003] All ER (D) 239 (Apr) and *Rao v General Medical Council* [2002] UKPC 65, [2002] All ER (D) 190 (Dec).

[18.38] The Court of Appeal disagreed with the Privy Council's judgments in these cases, and found that the PCC had misdirected itself as

to the law. Judge LJ gave the unanimous judgment of the court, which concluded that the Privy Council had misinterpreted the rules in question, and agreeing with Dame Janet Smith's views expressed in the Fifth Shipman Inquiry Report, stated that it is only when the PCC has decided whether a practitioner is guilty of serious professional misconduct should they proceed to consider the practitioners testimonials, which will be relevant to the appropriate penalty. Although the decisions of the Privy Council are not binding on the Court of Appeal, they are nonetheless highly persuasive, and it is significant that the Court of Appeal was so ready to disagree with the findings of the very senior judges who comprise the Privy Council.

[18.39] What is perhaps still more interesting is the fact that the Court of Appeal attached more weight to Dame Janet Smith's views than to those of the Privy Council. In terms of statutory interpretation this approach must surely be on the outer limits of what is acceptable practice. Dame Janet had been extremely critical of the GMC in her report on the Shipman Inquiry and had used, as an example of the lenient attitude of the PCC towards doctors, the practice of taking personal mitigating factors into account when deciding whether doctors are guilty of serious professional misconduct. She had expressed the view that the *Silver* and *Rao* cases had been wrongly decided, and that the Privy Council judges had misunderstood and misapplied the rules and certain aspects of the judgment of the Privy Council in *Preiss v General Dental Council* [2001] UKPC 36, [2001] All ER(D) 239 (Jul). It is perhaps no coincidence that Dame Janet herself is now sitting in the Court of Appeal.

[18.40] A further point of interest emerging from this case is that the Court of Appeal decided not to remit the case for rehearing, but simply made a declaration that the decision of the PCC decision was unlawful. This approach was apparently based on the view that Dr B should not be required to undergo a re-trial after having been acquitted, simply because the issue had been clarified, and in any event a re-hearing, and even a finding of serious professional misconduct, would not benefit the families of the children concerned.

[18.41] It is encouraging that the Court of Appeal was prepared to adopt so bold an approach to reform in this case, as it is likely to be some time before the effectiveness of the new disciplinary procedures introduced by the GMC can be assessed.

Clinical negligence

[18.42] The number of clinical negligence cases being reported is decreasing, perhaps as a result of the Civil Procedure Rules. Although several could be found in All England Direct, the only case of major significance is one involving child abuse which was reported in the All England Reports in 2005. This case, *D v East Berkshire Community Health NHS Trust; K v Dewsbury Healthcare NHS Trust; K v Oldham*

NHS Trust [2005] UKHL 23, [2005] 2 All ER 443, is also of major importance to family lawyers and tort lawyers (see [28.1] ff below). From a medical law perspective the case, which concerns the scope of the duty of care in negligence, is important because it has implications for the relationship between healthcare professionals and the primary carers of children, usually their patients.

[18.43] It can safely be assumed, in most situations involving medical care, that a duty of care is owed by doctors to their patients. What is less clear is whether this duty extends beyond the immediate patient to his or her relatives and carers. The practice of the courts, when faced with a novel situation in which it has not already been established that a duty of care exists, is to ask whether there was reasonable foresight of the claimant as a member of a group who is likely to suffer harm as a result of the defendant's acts or omissions; whether the relationship between the parties is of sufficient proximity; and whether it would be fair, just and reasonable to impose a duty in all the circumstances: *Caparo Industries plc v Dickman* [1990] 1 All ER 568. In effect, this means that the closer the relationship between the parties, and the more directly the claimant is harmed by the acts or omissions of the defendant, the more likely it is that a duty of care will be found to exist. Clearly, the relatives of a child patient are more remote from the patient's doctor than the patient himself. This does not mean that parents are not deeply affected or incapable of suffering harm when their children are wronged, but the UK courts tend to find that it would not be fair just or reasonable to impose a duty of care in these circumstances.

[18.44] The authorities suggest that the courts are reluctant to find that a duty of care exists outside the immediate doctor-patient relationship (*Powell v Boldaz* (1997) 39 BMLR 35). A particular problem arises in these cases because the injury suffered by the relatives is usually psychiatric in nature, and the law places strict limits on recovery for psychiatric injury (*Alcock v Chief Constable of the South Yorkshire Police* [1991] 3 All ER 88, (1990) 8 BMLR 37). The law in this area is driven by policy issues, including the perceived need to limit the number of claims by placing restrictions on the scope of the duty of care. However, taking into account all the authorities and the decisions of the European Court of Human Rights, it is now well established that a common law duty of care is owed by healthcare professionals to children. It is the position of parents which is somewhat different.

[18.45] *D v East Berkshire Community Health NHS Trust*; *MAK v Dewsbury Healthcare NHS Trust*; *RK v Oldham NHS Trust* provides a strong indication of a very cautious attitude on the part of the judiciary to suggestions that the scope of the duty of care should be extended to parents. The House of Lords dismissed appeals by three sets of parents who had been falsely accused of child abuse, and confirmed that they were not entitled to bring claims for damages against the defendants for

psychiatric harm caused by false allegations made against them by child welfare and healthcare professionals. The parents appealed against the ruling of the Court of Appeal ([2003] EWCA Civ 1151, [2003] 4 All ER 796) on the preliminary issue of law that their claims for damages for psychiatric injury against doctors and/or social workers should be struck out on grounds of public policy. The parents had suffered psychiatric illnesses following allegations that they had caused illness and/or injuries to their children. They alleged that there had been a negligent misdiagnosis of non-accidental injuries. In some instances the parents had also suffered financial loss. They argued that there were no sound policy reasons for denying the existence of a duty of care to the parents as well as to the children.

[18.46] The events in the case in question had all occurred before the Human Rights Act 1998 came into force. In each appeal, the claims had been dismissed at first instance on the basis of preliminary decisions that the defendants owed no duty of care to the claimants. These decisions were based on the ruling in *X and others (minors) v Bedfordshire County Council; M v Newham London Borough Council* [1995] 3 All ER 353, that it would not be 'fair, just and reasonable' to impose a duty of care in these circumstances.

[18.47] The Court of Appeal held in *D v East Berkshire* that the assessment of whether it would be fair, just and reasonable to impose a duty should be decided on the facts of each individual case, and acknowledged that there were strong policy reasons for deciding that no duty of care was owed to parents in relation to decisions concerning child abuse or childcare. When the decision turned on whether proceedings should be brought for the removal of a child from his or her parents, a common law duty of care could be owed to a child but not to the parents. Interestingly, the court ruled that the decision in *X v Bedfordshire* did not comply with the Human Rights Act 1998 as regards the children, and that it was no longer good law to rule that as a matter of law no common law duty was owed to a child in the investigation of suspected child abuse and the commencement of care proceedings.

[18.48] On appeal to the House of Lords, the parents argued that the duty owed by healthcare professionals to children to exercise proper skill and care in the investigation of alleged abuse extended to the parents as the primary carers. The House of Lords dismissed the appeals (Lord Bingham dissenting) and held that health professionals did not owe a duty of care to people suspected of having carried out abuse where those suspects suffered psychiatric injury, as long as the investigation was undertaken in good faith, even if it was carried out without due care and skill. The issue as to whether doctors or social workers owed a duty of care to parents depended on whether, applying the test laid down in *Caparo Industries plc v Dickman* [1990] 1 All ER 568: 'the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.'

[18.49] The majority reasoning was based on the notion that at common law alleged interference with family life did not justify a higher level of protection for suspects of child abuse than was afforded other suspected criminals. There was an apparent conflict between the interests of the parents and the children in such cases, so health professionals acting in good faith in what they believed were the best interests of the child should not have to contend with conflicting duties when investigation allegations of abuse. A lower level of protection could be justified in relation to parents in these circumstances. The appropriate level of protection for parents was that clinical and other investigations should be conducted in good faith. Parents would then enjoy a similar level of protection to that afforded to anyone else suspected of committing crimes.

[18.50] The House of Lords based this opinion on the view that there was insufficient proximity between the parents and the healthcare professionals to give rise to a common law duty of care. As the Court of Appeal had held, there were reasons of public policy for holding that no common law duty of care should be owed to the parents, and it would not fair, just and reasonable to impose such a duty (*Caparo Industries plc v Dickman*).

[18.51] In a carefully argued dissenting speech, Lord Bingham reasoned that he would not strike out the claims, but would allow them to go to trial because he was in favour of the courts being allowed to carry out a full preliminary exploration of the facts. He considered that it would involve only a small incremental development to recognise that the present claims were at least arguable. He recalled that although in the earlier cases (*X (minors) v Bedfordshire CC* [1995] 3 All ER 353) it had been decided that no duty of care was owed to children, there had since been instances of that having been extended by the courts. The same principle should, in his view, be applied to parents. An extension of the duty of care did not necessarily undermine effective communication between healthcare professionals; and should healthcare professionals need to take emergency action without informing a child's parents, that would not displace the concept that parents were the very people who normally had the closest concern for the interests of their children. As he pointed out (at [3]):

'What appeared to be hard-edged rules precluding the possibility of any claim by parent or child have been eroded or restricted. And a series of decisions of the European Court of Human Rights has shown that application of an exclusionary rule in this sensitive area may lead to serious breaches of convention rights for which domestic law affords no remedy and for which, at any rate arguably, the law of tort should afford a remedy if facts of sufficient gravity are shown.'

In France and Germany, claims made by parents in similar circumstances are not summarily dismissed and, in Lord Bingham's opinion, the issues under consideration should be dealt with under the concept of breach of

duty rather than duty of care, which had, in his view, proved to be a blunt instrument for identifying claims which should lead to recovery, as opposed to those which should not. He favoured evolutionary and incremental development of the law of tort, 'so as to fashion appropriate remedies to contemporary problems' (at [50]).

[18.52] Lord Nicholls gave the majority opinion, but acknowledged at the outset (at [52]), that 'it must be every parent's nightmare to be suspected of deliberately injuring his or her own child'. Although he accepted that under normal circumstances the interests of parents and their children do coincide, he considered that this would not be the case when a parent deliberately harms his child. It followed that any consideration of the liability of doctors and social workers called for two countervailing interests to be taken into account: the need to safeguard children from abuse by their parents; and the need to protect parents from unfair and undesirable interference with their family life. As child abuse is one of the worst forms of criminal conduct, and is peculiarly difficult to combat, investigations require intrusion by professionals into extremely sensitive areas of family life, the added complication being that a parent responsible for abuse is likely to give a false account of the child's history. Lord Nicholls explained that as the countervailing interest – the interest of the parent in his family life – is regarded as highly important by art 8 of the European Convention on Human Rights, any derogation requires strong justification.

[18.53] The House of Lords accepted that an important issue in these cases was how the countervailing interests can best be balanced when a parent is wrongly suspected of child abuse. The majority view was that health professionals must act in good faith, and not recklessly (ie careless as to whether an allegation of abuse is well founded or not). Misfeasance in public office calls for an element of bad faith or recklessness, and these cases involved allegations which are akin to that. The crucial question was whether the potential disruption in family life justified the imposition of a duty of care on professionals investigating suspected abuse by parents and carers who are under investigation. In the majority view, it did not.

[18.54] It was in the best interests of children when child abuse is suspected, that healthcare professionals should investigate all the circumstances in consultation with other similar professionals, and this process should not be hampered by the existence of a duty of care in negligence to the parents. However, healthcare professionals should always act in good faith. Lord Nicholls was not impressed by the suggestion of dealing with the issue as part of the question of breach of duty rather than duty of care, as proposed by Lord Bingham. He considered that this would lead to a period of uncertainty in this important area of law. He did, however, accept that there were some attractions to be found in the idea that the common law should (at [92]) 'jettison the concept of duty of care as a universal prerequisite to liability

in negligence', and use the concept of breach of duty to accommodate the complexities arising in certain areas of human activity. He was also prepared to acknowledge that it was difficult to identify the parameters of expanding areas of the law of negligence, especially in relation to the discharge of statutory functions by public authorities. However, he expressed some reservation about attempting to 'transplant this approach wholesale into the domestic law of negligence in cases where, as here, no claim is made for breach of a Convention right' (at [94]).

[18.55] Lord Rodger, who concurred, examined the cases on duty of care in relation to psychiatric injury in some depth, and made two further points. First, if the duty of care was extended to parents, the floodgates to further claims by other relatives, friends, teachers, child minders and so on would open. Secondly, as the events in the cases before the House of Lords took place before the Human Rights Act 1998 came into force, he reserved his opinion as to whether it would be appropriate in such cases to modify the common law of negligence, rather than to found an action on the provisions of the Act.

[18.56] Lord Brown recognised that it was easy to understand and sympathise with the parents' sense of grievance, but explained that it did not follow that the law should create a right of redress by finding the existence of a duty of care. He thought it impossible that the existence of a duty would fail to have an adverse impact on the doctor's approach to his task of identifying cases of child-abuse, and that conflicts of interest would be inevitable if there was a duty of care to the parents as well as to the children in such cases.

[18.57] This case demonstrates that the 'fair, just and reasonable test' established in *Caparo v Dickman* outranks the human rights arguments under art 6, despite the obvious disappointment which must have been experienced by the parents, who would surely have found it incomprehensible that no court would be permitted at least to carry out a preliminary investigation of the facts. The result of this decision is that where medical diagnoses of abuse are flawed, parents cannot bring claims against the investigators unless it is possible for them to prove bad faith. Thus except in extreme cases where bad faith is obvious, the courts cannot inquire into whether investigations of suspected abuse were conducted negligently.

Mental health

[18.58] Cases involving mental health issues are regularly brought before the UK courts, and it appears that a disproportionate number reach the House of Lords, in comparison with other medical law cases. Several mental health cases were reported in 2005 and it is not possible to cover all of them here. Cases not covered in this discussion which are of importance include *R (on the application of Mersey Care NHS Trust) v Mental Health Review Tribunal (Brady and another, interested parties)*

[2005] EWHC 1749 (Admin), [2005] 2 All ER 820, concerning whether proceedings before a mental health review tribunal should be in public, and its power to restrain the publication of certain matters; *R (on the application of B) v Haddock* [2005] EWHC 921 (Admin), [2005] All ER (D) 309 (May), concerning the treatment without consent of a restricted patient; and *R (on the application of Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58, [2005] All ER (D) 139 (Oct), concerning the legality of a hospital's seclusion policy.

The scope of s 153 warrants

[18.59] The House of Lords adopted a pragmatic approach when considering the case of *Ward v Metropolitan Police Commissioner* [2005] UKHL 32, [2005] 3 All ER 1013, which concerned the execution of a warrant to remove a person suffering from mental disorder to a place of safety, raising issues as to the validity of detailed conditions contained in such warrants.

[18.60] This was an appeal against a decision that execution of a warrant under the Mental Health Act 1983, s 135 against the respondent, and her removal to and detention in a hospital for which the trust was responsible was unlawful, because conditions imposed in the warrant by the magistrate had not been complied with. Section 135(1)(a) of the Mental Health Act 1983 provided that if, on information laid by an approved social worker, it appeared to a magistrate that there was reasonable cause to suspect that a person believed to be suffering from mental disorder had been, or was being, ill-treated, neglected or kept otherwise than under proper control, or being unable to care for himself was living alone, the magistrate could issue a warrant authorising any constable to enter premises specified in the warrant and, if thought fit, to remove the individual concerned to a place of safety. Section 135(4) provided that in the execution of a warrant a constable should be accompanied by an approved social worker and a registered medical practitioner.

[18.61] In this instance, the warrant issued by the magistrate had directed that the constable be accompanied by a named consultant psychiatrist, a named approved social worker and a named doctor, who was the patient's GP. However, in the event, the GP named in the warrant was not present when the warrant was executed, and the issue for consideration by the court was whether the magistrate had the power to impose conditions in the warrant that were additional to those expressly provided for under s 135, and to insist that certain named professionals should be involved in its execution. The claimant had brought an action for false imprisonment against the defendant commissioner and the NHS trust alleging that the grounds that her removal and detention had been unlawful, because the police officer had not been accompanied by the named GP, so rendering the execution of the warrant unlawful.

[18.62] The trial judge had held that the warrant had been lawfully executed, because it merely authorised the naming of certain individual professionals. It did not require the officer to take the named doctors with him. It followed from this that the detention in hospital was also lawful. The Court of Appeal allowed the claimant's appeal, finding that there was an implied power for a magistrate to impose any condition which could sensibly relate to the execution of a warrant to protect the interests of the person liable to be removed, while still furthering the object of the grant of the warrant. It held that the conditions imposed had not been complied with and the removal was therefore unlawful.

[18.63] On appeal by the defendants to the House of Lords, it was held unanimously that there were several factors indicating that, on true construction of s 135, it did not contain a power that enabled the magistrate to name particular professionals. There was no requirement that the doctor accompanying the police officer should either know the person being detained or have any specialist knowledge of mental health. Baroness Hale outlined the statutory history, and suggested that there had been a progressive relaxation of the requirement to name individuals in the warrant. Referring to the Report of the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency 1954–7 (Cmnd 169), she explained (at [10]):

‘Now it is assumed that people with mental disorders and disabilities should be treated just like everyone else ... But we have kept the possibility of detaining and treating them against their will in the interests of their own health or safety or for the protection of others.’

[18.64] The purpose of s 135(1) was to allow access to an individual in order to make proper arrangements for the treatment and care of the person believed to be suffering from mental disorder, and the object was to protect them from harm. No power to identify particular professionals could be implied into the magistrate's power to grant the warrant because that implication was not necessary to make the statutory power effective to achieve its purpose. That purpose was more likely to be achieved if the powers under the warrant were not restricted by naming the people who were to be present, or by allowing the magistrate to impose any other restrictions on its execution. Although it was necessary, at least in part, for the presence of a doctor and social worker to ensure that a person was not removed when judged that the basis for granting the warrant was not made out, that was not necessary for the proper functioning of s 135. Accordingly, any names in the warrant were surplus to requirements and had no effect on the legality of the warrant or its execution.

[18.65] In the view of the House of Lords, for the purpose of deciding this case, it was not necessary to consider whether the power to impose other conditions, such as time limits, could be implied. However, unlike an application for compulsory admission to hospital, s 135 did not contain

an express time limit within which a warrant should be executed. Accordingly, the appeal was allowed.

[18.66] From a practical perspective it is usually only as a last resort, when a patient is unwilling or unable to accept voluntary treatment in the community by a mental health crisis team, or admission to hospital, that applications are made under s 135. By the time this happens the patient's GP may well be involved, and his or her presence may be of some assistance to the other healthcare professionals involved. However, the removal of the individual concerned to a place of safety is the main priority, and to insist on the imposition of rigid conditions could be detrimental to that objective.

Human rights issues involved in admissions to hospital for assessment

[18.67] The House of Lords turned its attention to the question of the compatibility of s 2(2)(a) and s 29(3) of the Mental Health Act 1983.

[18.68] The adult patient in this case claimant was severely mentally disabled. In January 2003 she was admitted to hospital for assessment under s 2(2)(a) of the Mental Health Act 1983. A patient could be detained in hospital for up to 28 days under this section, but had the right to apply to a Mental Health Review Tribunal within 14 days of admission under s 66(2)(a) of the 1983 Act. The claimant made no such application. The claimant's nearest relative gave notice of her intention to discharge the claimant but the responsible medical officer believed that the claimant would be likely to act in a manner dangerous to herself or others and she was not discharged. On the final day of the 28-day period an application was made to the county court to appoint an acting nearest relative for the claimant under s 29(3) of the 1983 Act, on the grounds that the nearest relative unreasonably objected to a guardianship application, or that the nearest relative had exercised the power to discharge the patient from hospital or guardianship without due regard to the welfare of the patient.

[18.69] While the application was pending, immediately before the 28-day period expired, that period was automatically extended until the application had been finally disposed of. That was not until the mother's appeal against the county court order was dismissed in May 2005. The county court had made an interim order and the claimant had been found a suitable placement. Judicial review proceedings were commenced while the claimant was still in hospital, challenging the compatibility of ss 2 and 29(3) with the art 5(4) right under the European Convention (as stated in Sch 1 to the Human Rights Act 1998) that everyone deprived of liberty 'shall be entitled to take proceedings' by which the lawfulness or otherwise of his detention was to be determined speedily by a court.

[18.70] The claimant did not succeed in the High Court, but the Court of Appeal made two declarations of incompatibility. First, that s 2 of the 1983 Act was incompatible with art 5(4) of the Convention because it was

not attended by adequate provision for reference to a court of patients detained under s 2, where a patient had a right to make application to a mental health review tribunal but the patient was incapable of exercising that right on his own initiative. Secondly, that s 29(4) of the 1983 Act was incompatible with art 5(4) in that it was not attended by provision for the reference to a court of the case of a patient detained under s 2 of the Act whose period of detention was extended by the operation of s 29(4). The Secretary of State appealed.

[18.71] The House of Lords, reversing the decision of the Court of Appeal, held that s 2 of the 1983 Act was compatible with art 5(4) of the Convention, which requires that every person detained should have the right to take proceedings to challenge his or her detention, not that the case of every person detained should be considered before a court or tribunal. It was accepted that there was a strong argument that the right to bring proceedings was ineffective if the patient lacked the ability to do so, and emphasised that every sensible effort should be made to enable the patient to exercise the right if there was reason to think that he or she would wish to do so. The system in the UK did make every effort to provide patients and their relatives with easy access to the tribunal. Hospital managers had a duty to take such steps as were practicable to ensure that the patient understood the right to apply to a tribunal.

[18.72] Moreover, there were means in existence of operating s 29(4) in a way which was compatible with the patient's rights. If county court proceedings became protracted and the patient was detained indefinitely without recourse to a tribunal, her art 5(4) rights would be violated unless there was some other means of bringing proceedings was available. Although the most appropriate means was the use of the power of the Secretary of State to refer the case to a mental health review tribunal, judicial review and/or habeas corpus were also available to ensure compliance with the patient's art 5(4) rights. Accordingly, the appeal was allowed.

Funding for mental health services

[18.73] There have been several challenges in the past on questions involving the provision of facilities under the National Health Service Act 1977. A recent example concerned the provision of a project to assist people suffering from mental health difficulties.

[18.74] In *R (on the application of Keating) v Cardiff Local Health Board (Secretary of State for Health, intervening)* [2005] EWCA Civ 847, [2005] 3 All ER 1000 the Court of Appeal held that on construction of s 3(1)(e) of the 1977 Act, the local health board was acting within the law in providing funding to assist people suffering from mental health difficulties in coping, inter alia, with the social security system. This was a question of statutory interpretation, and the Court of Appeal ruled that 'facility' meant 'that which facilitates', and that could cover 'services'.

Finding in favour of the applicants, the Court of Appeal allowed the appeal. This decision is to be welcomed, as the project in question was praised for its valuable work.

Human genetics and the law

[18.75] Medical law is a dynamic legal subject and developments in technology lead to litigation on matters which would have been science fiction a decade ago. Perhaps the field in which this is most in evidence is human genetics.

Legality of pre-implantation diagnosis to save a sibling

[18.76] Recent scientific developments make it possible for parents of children suffering from genetic diseases to undergo IVF treatment which facilitates pre-implantation genetic diagnosis and tissue-typing, procedures which can lead to the birth of babies whose tissues can be used to save the lives of their siblings.

[18.77] In *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2005] UKHL 28, [2005] 2 All ER 555 the House of Lords considered the legality of licensing by the HFEA of pre-implantation genetic diagnosis and examination of human leukocyte antigens known as 'tissue typing'.

[18.78] The case chiefly turned on statutory interpretation, like many coming before the House of Lords, and was an appeal against the decision of the Court of Appeal that the respondent authority had the power to authorise tissue typing in order to assist a woman who wished to provide medical treatment for her child, Z, by giving birth to a tissue-compatible child. Z suffered from a serious genetic disorder called beta thalassaemia major, and had reached the age of 6. He had frequent episodes of severe illness and required daily medication and regular blood transfusions to survive. However, he could be restored to normal life by a transplant of stem cells from a tissue compatible donor. Unfortunately, it would be virtually impossible to find a donor who was not a sibling, and even in the case of siblings, the chances are just one in four. Not one of Z's three elder siblings was compatible. A further difficulty lies in the fact that the donor must be free of the same disorder. Z's mother has twice conceived in the hope of giving birth to a child whose cord blood could provide stem cells for Z, but one foetus was found to have beta thalassaemia major, so she had an abortion. On the second occasion she gave birth to a child whose tissue was incompatible.

[18.79] Thanks to recent scientific advances it has become possible to perform a biopsy on a newly fertilised embryo in vitro and remove a single cell to test it for genetic disorders – a process called pre-implantation genetic diagnosis (PGD). This provides sufficient information about the genetic make-up of the embryo so to allow a couple to decide whether

or not to proceed with a pregnancy. More recently in the United States, a new technique has been developed, allowing the same single-cell biopsy technique to test for tissue compatibility. The process involves examination of the human leukocyte antigens, and is called HLA typing. If a couple's sperm and eggs are used to create IVF embryos which are tested for beta thalassaemia major and for tissue compatibility with Z by HLA typing, the parents can be assured that the child conceived will have stem cells which could cure a sibling. The issue before the House of Lords was whether this could lawfully be done in the United Kingdom.

[18.80] A licence is required under the 1990 Act to carry out procedures of this kind, without which it is a criminal offence to bring about the creation of an embryo artificially, or to keep or use an embryo. Section 3(a) of the Act provides: '(1) No person shall (a) bring about the creation of an embryo ... except in pursuance of a licence ...' The HFEA has the power to grant licences authorising activities in the course of providing 'treatment services'. Section 2 provides: '(1) In this Act ... "treatment services" mean medical, surgical or obstetric services provided ... for the purpose of assisting women to carry children ...' Activities could be licensed if they appeared to the authority to be necessary or desirable for the purpose of providing treatment services, including 'practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose'.

[18.81] The HFEA had granted a licence for pre-implantation genetic diagnosis and tissue typing and argued that tissue typing intended to secure that an embryo was suitable for implanting in a woman within Sch 2, para 1(1)(d) to the 1990 Act. That, the authority argued, was because the mother was entitled to regard an embryo as 'unsuitable' unless it was both free of abnormality and tissue compatible with the sibling, and was desirable for the purpose of providing her with IVF treatment services within Sch 2, para 1(3) that she should be able to make such a choice.

[18.82] The question before the court concerned activities which may be authorised to be done in the course of providing treatment services. The claimant, on behalf of an organisation concerned with 'pro-life' issues, sought judicial review of the authority's decision to grant the licence. Her application was allowed, the judge holding that the only embryo testing permitted by the 1990 Act was PGD to identify genetic defects which would affect the viability of the foetus. The HFEA succeeded on appeal to the Court of Appeal, and the claimant appealed. The authority submitted that both PGD and HLA typing were designed to determine whether an embryo would be 'suitable' for the purpose of being placed in Z's mother, who was entitled to regard an embryo as unsuitable unless it were free of abnormality and also tissue compatible with Z, and who was unable to make an informed choice without such testing. The claimant argued that

the authority had no power to licence HLA typing, arguing that to give such a broad meaning to the word 'suitable' could not have been the intention of the 1990 Act, since if the mother's choice were a legitimate ground for selection, frivolous reasons or sinister eugenic reasons might also become permissible. She contended that an embryo was 'suitable' if it were capable of developing into a healthy child, so that while PGD was acceptable to establish that an embryo was free from genetic abnormalities, HLA typing was not.

[18.83] The appellant submitted that although 'suitable' meant more than 'viable' it had to be given a narrower meaning than 'suitable for the particular mother'. The House of Lords held that it was lawful for pre-implantation genetic diagnosis and tissue typing to be authorised by the HFEA, as they constitute activities to determine the suitability of the embryo for implantation within the meaning of Sch 2, para 1(1)(d) to the 1990 Act. The discussion turned inevitably on statutory interpretation, and a purposive approach was applied. The House of Lords was of the opinion that it had not been the intention of Parliament to confine the respondent authority's powers to unsuitability on grounds of genetic defects. One of the most significant indications of this was the absence of any reference in the 1990 Act to selection on grounds of sex.

[18.84] The House of Lords took the view that it had been the intention of Parliament to leave to the HFEA the decision as to whether activities such as tissue typing should be permitted, as the HFEA was established precisely to consider ethical issues and to determine what activities were appropriate. The concept of 'suitability' included the idea of taking into account the wishes and needs of the mother, and it was within the powers of the respondent to authorise tests to decide whether the embryo was suitable for implantation in her womb. The HFEA was not, however, obliged to do so. It might, for example, consider that allowing the mother to select an embryo was undesirable on ethical grounds. Tissue typing, like pre-implantation genetic diagnosis, yielded information about the characteristics of the embryo which was relevant to the decision of the mother as to whether or not to have the child. Once it was conceded that pre-implantation genetic diagnosis could be licensed to provide not only a viable foetus but a healthy child, there could be no basis for construing the respondent's power to end at that point. Accordingly, the appeal was dismissed.

[18.85] Lord Brown pointed out the complexity of the ethical matters in this case:

'The ethical questions raised by such a process are ... profound ... Is this straying into the field of "designer babies" or, as the celebrated geneticist, Lord Winston, has put it, "treating the offspring to be born as a commodity"?'

The outcome to this litigation is to be welcomed, and fortunately, this matter has been settled once and for all by the House of Lords. Parents

who care for seriously ill children can be under considerable physical and emotional strain, and it is important for them to be afforded the opportunity to have access to recently developed treatments in the knowledge that they are not contravening the law.

Clarification of matters concerning keeping of embryos

[18.86] The Attorney General has referred to the Court of Appeal for clarification questions surrounding the meaning of certain phrases in the Human Fertilisation and Embryology Act 1990.

[18.87] The Court of Appeal took the view that the ‘person responsible’ for keeping an embryo, as defined by the 1990 Act, was not an individual who as a matter of law was a keeper of embryos at the conception unit in whose licence he was named as being the ‘person responsible’. Criminal liability for keeping an embryo except as authorised by the licence did not extend to an individual who, notwithstanding his statutory responsibilities, did not in fact keep the embryo. Sections 3, 17, and 41 of the 1990 Act did not suggest criminal liability in the ‘person responsible’ solely by virtue of his appointment. His role was merely to ensure that proper arrangements were available both for keeping and disposing of the embryos. Failure to do so could attract the operation of the regulatory mechanism.

Practice and Procedure

A A S ZUCKERMAN, LL.M., MA

Fellow of University College, Oxford

Service

When service of the claim form needs to be effected on the defendant's solicitors

[19.1] Where the defendant's solicitor is authorised to accept service on behalf of the defendant and the solicitor has notified the claimant of such authority, the claim form must be served on the solicitor and not on the defendant personally (CPR 6.4). However, it has been held in *Firstdale Ltd v Quinton* [2004] EWHC 1926 (Comm), [2005] 1 All ER 639 that where a solicitor notifies prospective claimant A of authorisation to accept service of A's claim form in respect of an a debt alleged by A, this does not amount, for the purpose of CPR 6.4, to an indication of authority to accept service from B, to whom A assigned his rights. It was therefore held that B was within his rights to serve the claim form on the defendant himself, even though B was represented by the same solicitors who received the notification of authority in respect of A. Colman J explained (at [25]) that:

'although a statutory assignee takes subject to equities which go to the substance of the debt assigned, he does not take subject to the procedural status of the assignor at the time of the assignment. Thus, if after the commencement of proceedings for the recovery of a debt, the claimant were to assign the debt to an assignee and give notice of the assignment to the defendant, it would not be open to the assignee simply to conduct the proceedings as if he were standing in the shoes of the assignor unless he were joined as a claimant under CPR 19.2(4) and proved his title to sue as assignee.'

Correcting a procedural error in applying for extension of the period for service

[19.2] The Court of Appeal has clearly stated on numerous occasions that an extension of time for service of the claim form can only be obtained within the limits of CPR 7.6. An application to extend the time for service of the claim form after the end of the period for service may only be granted where the court has been unable to serve the claim form, or the claimant has taken all reasonable steps to serve the claim form but has been unable to do so, and, in either case, the claimant has acted promptly in making the application (CPR 7.6(3)). A claimant cannot escape these conditions by invoking the court's general power under

CPR 3.10 to remedy procedural errors. But what if the claimant was aware of the need to seek timely extension and did apply for an extension within the time of service but made a mistake in the application and described it as an application for late service of the particulars of claim rather than of the claim form? This is what took place in *Steele v Mooney* [2005] EWCA Civ 96, [2005] 2 All ER 256. The claimant's solicitors were in correspondence with the defendants about the need for an extension of time for service of the particulars of claim. When it was pointed out to them that the time for service of the claim form could not be extended by the parties' consent, they applied to court, within the period for service, but in error requested time 'for the service of the particulars of claim and supporting documentation' without referring to the claim form. The application was granted. The claimant's solicitors then realised the error and applied under CPR 3.10 for a decision that the order granting an extension of time should be amended to rectify the error. The application was granted. On appeal, the circuit judge held that what occurred was not an error of procedure, which consisted of a failure to comply with a rule or practice direction, but was a drafting error on the part of the solicitors, and that the case did not come within the scope of CPR 3.10.

[19.3] The Court of Appeal disagreed. Dyson LJ explained that a procedural error may take many forms and that is why CPR 3.10 gives a non-exhaustive definition of a procedural. He stated (at [20]):

'... procedural errors are not confined to failures to comply with a rule or practice direction. A party may take a procedural step which is permitted by the rules and practice directions, but which he takes in error. A party may by mistake do X when he intended to do Y, where both X and Y are procedural steps and both are permissible ... If a claimant applies for an extension of time for service of the particulars of claim when he intends to apply for an extension of time for service of the claim form, he makes an error of procedure.'

At the same time Dyson LJ reiterated that although a failure to serve a claim form within the time for service is a procedural error, 'the general language of r 3.10 cannot be used to achieve something that is prohibited under another rule' (at [24]). The position therefore remains that CPR 3.10 cannot be used to escape the strictures of CPR 7.6(3). In this case, however, the court held that granting the claimant's application to correct the error did not circumvent the prohibition in CPR 7.6(3) because the claimants did intend to apply timeously for an extension of time and there was no doubt that application would have been granted.

Failure of service – setting aside default judgment

[19.4] In *Akram v Adam* [2004] EWCA Civ 1601, [2005] 1 All ER 741 the defendant applied to set aside a default judgment on the grounds that he did not receive the claim form, which was otherwise served in accordance with the rules. The issue was whether the setting aside is as of

right or whether it fell under CPR 13.3(1), which is discretionary and normally depends on a showing of a real prospect of success. The defendant argued that once it has been established that the claim form did not reach him, the default judgment should be set aside *ex debito justitiae*, since the right to have notice of the proceedings against him was a fundamental requirement of fair trial. Speaking for the Court of Appeal, Brooke LJ rejected (at [43]) the argument that the right to fair trial under ECHR, art 6 dictated such result:

'I cannot believe that Strasbourg jurisprudence requires the procedural rules of a national court to oblige the claimant in such a case to initiate further ancillary proceedings to strike out a defence or to enter summary judgment under CPR Pt 24, with all the concomitant expense and delay which this would involve. The fair trial guarantees in art 6 of the convention must entitle a defendant to be heard, but if he cannot show the court that his defence would have a real prospect of success, or that there is some other compelling reason why a trial should be conducted, it does not require the parties and the court to indulge in an expensive and time-consuming charade. In *James v UK* (1986) 8 EHRR 123 at 157–158 (para 81) the European Court of Human Rights said that art 6(1) extends only to "contestations" (disputes) over (civil) "rights and obligations" which can be said, at least on arguable grounds, to be recognised under domestic law. If a court, like Judge Yelton, is satisfied that the defendant would not have an arguable defence if the default judgment were set aside, art 6 does not in my judgment entitle the defendant to a trial (or oblige the claimant on some other occasion to show that the defendant has no arguable defence).'

It is of course true that the right of access to court under art 6 does not require the court to afford a defendant the opportunity of a full trial on the merits when his defence lacks merit. This is why a claimant may apply to have the defence struck out under CPR 3.4(2)(a), as disclosing no reasonable grounds for persisting with it, or for a summary judgment under CPR Pt 24, on the grounds that the defence has no real prospect of success. Indeed, the court may initiate summary judgment proceedings of its own motion (CPR 3.3; 26 PD 5). There was therefore no impediment to entering a judgment against a defendant on one or other of the above two grounds. But the court did not follow this course. Instead, it refused to disturb the default judgment. There is simply no escaping the fact that the court seems to have upheld the very judgment that was given without affording the defendant an opportunity to be heard, thus implying that a judgment may be good even in the absence of such opportunity being given before the judgment was entered.

[19.5] The procedure sanctioned by the court in this case may be contrasted with the procedure followed where the court has issued an interim injunction or a freezing order after a without notice application. Such an order is normally of limited duration, or until further order, so as to allow the respondent an opportunity to be heard. At the inter partes hearing, the burden is on the applicant and not on the respondent to justify continuation of the order, since the latter had no opportunity to be

heard at the without notice hearing. At the end of the inter partes hearing the court will make a fresh order, even if only to continue the without notice order. This process gives due effect to the right to be heard without compromising efficiency or justice. There is no reason why a similar approach should not be adopted in applications for setting aside a default judgment in the absence of notice to the defendant. It is suggested that where the court is minded to refuse the defendant an opportunity to proceed with his defence, the court should (either at the claimant's behest or of its own motion) enter fresh judgment against the defendant, which will of course need to be properly founded.

Fair trial

[19.6] In *AMEC Capital Projects Ltd v Whitefriars City Estates Ltd* [2004] EWCA Civ 1418, [2005] 1 All ER 723 the appointment of an adjudicator under the Housing Grants, Construction and Regeneration Act 1996 had been defective. As a result, the same adjudicator was duly reappointed to hear the case again. One party objected on the grounds that, having decided the dispute against him once, the adjudicator could not decide again with complete impartiality. The Court of Appeal rejected this argument, holding that an adjudicator was not automatically disqualified merely because he had heard the case before. Adjudicators were assumed to be trustworthy and to understand that they should approach every case with an open mind. If the evidence and arguments were merely a repeat of what went before, the adjudicator was not expected to ignore his earlier decision and not to be inclined to come to the same conclusion as before, particularly if the previous decision was carefully reasoned. All that was necessary for him to do is to give such reconsideration to the matter as was reasonably necessary for him to be satisfied that his first decision was correct.

Public access to court materials

[19.7] The diminution in the orality of civil trials has given rise to increasing demands by members of the public for access to court files. *Re Guardian Newspapers Ltd* [2004] EWHC 3092 (Ch), [2005] 3 All ER 155 explains how the court should respond. During a particular trial, witness statements stood in place of evidence-in-chief and some cross-examination took place. The trial was adjourned before the last witness was due to testify, but was settled immediately afterwards. When a newspaper discovered that the dispute had been settled before its reporters could attend the last day of testimony, it requested to see the witness statements in the case. The defendant objected.

[19.8] Under CPR 5.4(5)(a), unless the court orders otherwise, any person may obtain from the records of the court a copy of a claim form and a judgment or order given or made in public. Under CPR 32.13 a witness statement which stands as evidence-in-chief is open to inspection

during the course of the trial unless the court otherwise directs. Since the trial in this case was over, the newspaper could not obtain access to the witness statements under CPR 32.13. It therefore applied under CPR 5.4(5)(b), which empowers the court to permit non-parties to obtain from the records of the court a copy of documents filed by a party. The defendant contended: (i) that the court had no jurisdiction under CPR 5.4(5)(b) once the case has been concluded; and (ii) that the principle of open justice did not apply, since the newspaper was not motivated merely by the wish of keeping the judicial system under scrutiny nor in order to publish a fair and accurate report of the of the case. Park J rejected both arguments, holding that the meaning of 'the court' which could give permission under r 5.4(5)(b) was not restricted to the court seized of the underlying case but extended to the court that dealt with the proceedings. The court was therefore empowered to give permission even after the case was over.

[19.9] Furthermore, Park J stated that the court's discretion should normally be exercised in favour of disclosure to the public of materials which, in proceedings in open court, had entered into the public domain. Pleadings, and witness statements which had been confirmed in general terms by their makers and stood as evidence-in-chief, were to be regarded as documents which had been read in open court. The newspaper had an entirely legitimate interest in inspecting the witness statements, which was related to the core of its business and the purpose of its existence in disseminating information. As there was no evidence from the defendant that it would suffer damage if the newspaper obtained the documents, the newspaper application to see certain witness statements was allowed. This approach more than compensates for the loss in orality, for members of the public can now have access to materials in the court files and peruse them long after the trial has ended. (See also [7.16]–[7.17] above.)

[19.10] The process of obtaining permission for inspecting documents from the court file was set out by Moore-Bick J in *Dian AO v Davis Frankel & Mead (a firm)* [2004] EWHC 2662 (Comm), [2005] 1 All ER 1074, [2005] 1 All ER (Comm) 482. The applicant for permission must identify with reasonable precision the documents or class of documents which he sought to search for, inspect and copy. He must set out the grounds for the application. The court ought generally to lean in favour of allowing access to documents that had been read by the court as part of the decision-making process, in accordance with the principle of open justice. But the court should be more careful in giving permission to inspect affidavits or statements that had not been read by the court as part of that process, as the principle of open justice did not come into play in relation to documents filed only for the purposes of administration. The court should only give access to documents of that kind if there were strong grounds for thinking that it was necessary in the interests of justice to do so. In respect of such documents the applicant would improve his

chances of obtaining permission if he disclosed the full reasons for the application, such as information about the proceedings in relation to which he required the information.

Legal professional privilege

[19.11] In *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2004] UKHL 48, [2005] 4 All ER 948 the House of Lords reversed the Court of Appeal's judgment ([2004] EWCA Civ 218, [2004] 3 All ER 168). The issue before the Court of Appeal was whether communications between the Bank of England's Bingham Inquiry Unit (BIU), which was considered to be the client for the purpose of legal professional privilege (LPP), with the bank's solicitors were covered by LPP. The claimants argued that they were not, for the following reasons. The Bingham Inquiry was not an adversarial process concerned with the determination of rights and obligations, ie it was not litigation and therefore no litigation privilege applied. Therefore, the only protection could come from advice privilege. Advice privilege attached only to communication with a lawyer for the purpose of obtaining legal advice, not any other kind of advice. The issue therefore boiled down to whether the communications were in connection with obtaining legal advice. The bank employed its solicitors in order to assist it to present its position before the Bingham Inquiry in the best possible light. The claimants argued that since the solicitors provided advice about presentation rather than about legal rights and obligations the communications were not privileged.

[19.12] The Court of Appeal accepted this argument. It held that legal advice privilege attached only where advice and assistance was sought in relation to legal rights and obligations. The Court of Appeal therefore concluded that the communications between the BIU and its solicitors were not privileged. The House of Lords disagreed. It held that legal advice privilege covered advice and assistance in relation to public law rights, liabilities and obligations as well as private law rights. For policy reasons legal advice for the purposes of the privilege should not be confined to telling the client the law but also included advice as to what should prudently and sensibly be done in the relevant legal context. Lord Scott stated (at [43]):

'The preparation of the evidence to be submitted and the submissions to be made to the inquiry on behalf of the bank were for the purpose of enhancing the bank's prospects of persuading the inquiry that its discharge of its public law obligations under the Banking Acts in relation to BCCI was not deserving of criticism and had been reasonable in the circumstances. The presentational advice given by Freshfields and counsel for that purpose was advice "as to what should prudently and sensibly be done in the relevant legal context" (*Balabel v Air-India* [1988] 2 All ER 246 at 254 ...). The "relevant legal context" was the Bingham inquiry and the question whether the bank had properly discharged its public law duties under the Banking

Acts. The presentational advice falls, in my opinion, squarely within the policy reasons underlying legal advice privilege.'

While it is important not to place legal advice privilege into a straitjacket that might undermine its efficacy, it is equally important not to stretch its bounds to the point where its legitimacy may be undermined. If the privilege extended to the kind of advice given by other professionals, such as investment advisers, accountants, or estate agents, questions of unfair competition might well arise. Indeed, it would then be legitimate to question whether legal professional privilege is justified at all, given that other professional advisers are able to deliver a satisfactory service without the benefit of immunity from compulsory disclosure.

[19.13] Notably, the House of Lords declined to express an opinion about the correctness of the earlier Court of Appeal decision in this case: *Three Rivers District Council v Governor and Company of the Bank of England (No 7)* [2003] EWCA Civ 474, [2003] All ER (D) 59 (Apr), in respect of which leave to appeal to the House of Lords had earlier been refused. In that decision the court held that legal advice privilege only covered communications passing directly between the solicitor and his client. But not to documents prepared by third parties for the purpose of being passed by the client to the legal adviser in connection to obtaining legal advice. Therefore, it held that documents prepared by employees of the Bank of England at the request of BIU for the purpose of being passed to the bank's solicitors in order to obtain legal advice were not privileged. This aspect of legal professional privilege is far more important, since it concerns the extent of privilege protection that corporate bodies could expect with regard to documents prepared by corporate employees for the purpose of being sent to legal advisers in order to obtain legal advice. Given the practical importance of this aspect, a further visit to the House of Lords is to be expected.

Proceedings by video link

[19.14] The availability of video conferencing (VCF) is now fairly wide. Parties are expected to avail themselves of this facility where it would promote efficiency and save costs (32 PD, Annex 3, 2). In *Pastouna v Black* [2005] EWCA Civ 1389, [2005] All ER (D) 346 (Nov) Brooke LJ deprecated that fact that solicitor and counsel, representing a legally aided appellant, came all the way from Liverpool for a half-hour hearing at the Court of Appeal in London of an application for permission to appeal, when they could have easily made their arguments to the court by means of video conferencing. The Court of Appeal indicated that failure of the legal representatives to avail themselves of VCF will be taken into account when assessing the costs of the application.

[19.15] Witnesses are expected to testify in court and may be compelled to do so by means of a witness summons. The court has, however, discretion to allow witnesses to testify by video link, known as video

conferencing (VCF) (CPR 32.3). Where a mere witness is concerned, the desirability of testifying by VCF turns principally on practical considerations, such as cost and the ability of the court to control the witness at the remote place from which he is to testify. More complex considerations are involved where one of the parties seeks permission to testify by VCF. In *Polanski v Condé Nast Publications Ltd* [2005] UKHL 10, [2005] 1 All ER 945 the claimant, who lived in France, sued the defendant for defamation but did not wish to come to the United Kingdom to give evidence as he was a fugitive from justice in the United States and did not wish to run the risk of being extradited. He therefore sought permission to be allowed to give his evidence from France by means of VCF. The judge gave permission but the Court of Appeal reversed the decision. On appeal to the House of Lords the issue was whether the administration of justice would be brought into disrepute if the claimant were allowed to testify by VCF. The House of Lords held that even a fugitive from justice was entitled to invoke the assistance of the court in protection of his civil rights and could bring or defend proceedings. If the administration of justice were not brought into disrepute by virtue of entertaining a claim from such a person, the House of Lords held, there was no reason why it should be regarded as brought into disrepute by permitting the fugitive to have recourse to a procedural facility flowing from a technological development readily available to all litigants. Accordingly, the court held that as a general rule, a claimant's unwillingness to come to the United Kingdom because he was a fugitive from justice was a valid reason, and could be a sufficient reason, for making a video conferencing order.

Interim injunction to restrain publication of defamatory material

[19.16] The right not to be defamed comes under the protection of ECHR, art 8. But for the decision in *Bonnard v Perryman* [1891] 2 Ch 269, [1891-4] All ER Rep 965, applications for interim restraint on publication of defamatory material would have to be dealt with in accordance with the principles laid down in *Cream Holdings Ltd v Banerjee* [2004] UKHL 44, [2004] 4 All ER 617 (discussed in All ER Rev 2004 at [19.13] ff). However, it has been held in *Greene v Associated Newspapers Ltd* [2004] EWCA Civ 1462, [2005] 1 All ER 30 that the Human Rights Act 1998, s 12 has left the common law position with regard to defamation cases unaffected and that, therefore, a court would not impose a prior restraint on publication unless it was clear that no defence would succeed at trial. Accordingly, an applicant can obtain an interim injunction to restrain publication of defamatory material, where the defendant pleads justification, only if he can persuade the court that he is bound to succeed at the trial.

[19.17] The reasons for requiring a higher threshold of proof in defamation applications than in applications for the protection of confidentiality or of privacy were explained by Brooke LJ in the *Greene*

case (at [76]–[78]). First, in applications to restrain publication of defamatory material it is difficult to assess the parties' respective prospects of success because they often turn on the credibility of witnesses and on detailed consideration of documents. Given that issues of justification may be tried by jury, any interim assessment of the parties' respective merits is likely to be highly speculative, since it is virtually unknowable how a jury would react to the witnesses. Secondly, Brooke LJ explained, damage to reputation may be adequately compensated and the applicant's reputation may be vindicated after trial, if it turns out that the publication was wrongful. By contrast, in cases involving confidential documents, the confidentiality of the documents will be lost completely if an injunction against disclosure is not granted when appropriate. 'The damage that may on occasion be done by refusing an injunction where a less strict rule would facilitate its grant', he concluded (at [78]), 'pales into insignificance compared with the damage which would be done to freedom of expression and the freedom of the press if the rule in *Bonnard v Perryman* [[1891] 2 Ch 269, [1891–4] All ER Rep 965] was relaxed.'

Freezing injunctions

[19.18] In *Customs and Excise Commissioners v Barclays Bank plc* [2004] EWCA Civ 1555, [2005] 3 All ER 852 the Court of Appeal reversed Colman J's decision (discussed in All ER Rev 2004 at [19.21]). The claimants obtained freezing orders in respect of outstanding VAT against two companies which held accounts with the defendant bank. The bank was served with copies of the orders, but within hours and before the bank put a stop on the account the companies withdrew substantial sums from their accounts. The claimants brought proceedings for negligence against the bank. The Court of Appeal held that once it had been notified of the freezing orders, the bank owed a duty of care to the claimant to ensure that funds in the frozen accounts should not be dissipated in breach of the freezing orders. The bank was therefore ordered to compensate the claimants to the tune of the funds that had been removed by the defendants. It is likely that as a result of this decision banks will increase their charges for compliance with freezing orders to take account of their potential liability in negligence.

[19.19] Where an English court has made a worldwide freezing order, it maintains control over the enforcement of the order in foreign jurisdictions by requiring claimants to seek court leave to take steps to enforce the orders in other jurisdictions. The requirement of leave is intended to protect defendants from misuse of information obtained as a result of a disclosure order and from oppressive multiplicity of proceedings in other jurisdictions (*Derby & Co Ltd v Weldon* [1989] 1 All ER 469). In *Dadourian Group International Inc v Simms* [2005] EWHC 268 (Ch), [2005] 2 All ER 651, Laddie J summarised the position (at [47]):

'(1) Where a worldwide freezing order is made by an English court, it is for that court to determine whether and to what extent the claimant should be allowed to seek enforcement through foreign courts. It must regulate the proceedings. (2) To that end, a party applying for a worldwide freezing order should normally offer an undertaking not to try to enforce abroad without prior permission from the English court. (3) Applications for permission to seek enforcement abroad will normally, but not inevitably, be made *inter partes*. (4) In deciding whether to give permission, the English court must bear in mind that a proliferation of foreign proceedings may well be oppressive to the defendant. (5) It must also be informed of the relevant law and practice in the foreign court so that it can satisfy itself that the satellite relief obtained in the foreign court will not go further than that secured by such orders in this country.'

To obtain permission for enforcement abroad, the claimant does not have to prove that the defendant has assets in that country and that there is a real risk of dissipation to the same level of confidence as is necessary to justify the grant of a freezing order in the first place, Laddie J stated in the same case. All that a claimant needs to demonstrate is a real prospect that the assets are in the country where enforcement is sought. (See also [3.6] above and [28.8] below.)

Appeal

Need to give timely notice of withdrawal of an appeal

[19.20] The Court of Appeal has been critical of the failure of some parties to give the court early notice that they have settled, with the result that Court of Appeal resources are wasted. In *Jeyapragash v Secretary of State for the Home Department* [2004] EWCA Civ 1260, [2005] 1 All ER 412, Brooke LJ lamented the fact that the amended CPR PD 52, para 15.6, which came into force on 30 June 2004, is not always complied with. The gist of this Practice Direction is that all preparations for appeal must be completed at least seven days before the appeal. Brooke LJ explained (at [4]) that 'instead of regarding one minute before the Court of Appeal sits as the time up to which parties in a leisurely way can prepare the papers for the court, the new time is seven days before a hearing'. He therefore stated (at [7]) the Court of Appeal's approach to late cancellations of appeals as follows:

'... the Court of Appeal will... refuse to grant orders by consent administratively if the requirements of the Practice Direction are broken. The court will require the parties to attend to explain any breach of the Practice Direction and why it happened. I draw the attention of those concerned in these matters to the new power of the presiding Lord Justice to require a lawyer for the parties to come and explain what is or is not going on in the week before the hearing (see for example para 15.11B(2)). There are also the new rules as to the costs consequences of non-compliance (see, for example, paras 5.10(6) and 15.4(1)).'

This message was reiterated in *Mlauzi v Secretary of State for the Home Department* [2005] EWCA Civ 128, [2005] All ER (D) 96 (Feb).

The test for allowing a second appeal

[19.21] A second appeal is subject to an even more restrictive test than that applicable to permission for a first appeal. The Access to Justice Act 1999, s 55(1) provides that permission for a second appeal must be obtained from the Court of Appeal and that it may be granted only if ‘the Court of Appeal considers that the appeal would raise an important point of principle or practice, or that there is some other compelling reason for the Court of Appeal to hear it’. The limits set by CPR 52.13(2), which incorporates this test were examined by the Court of Appeal in *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60, [2005] 3 All ER 264. Dyson LJ stated (at [18]):

‘... is clear that the reference in r 52.13(2)(a) to “an important point of principle or practice” is to an important point of principle or practice that has not yet been established. The distinction must be maintained between (a) establishing and (b) applying an established principle or practice correctly. Where an appeal raises an important point of principle or practice that has not yet been determined, then it satisfies r 52.13(2)(a). But where the issue sought to be raised on the proposed appeal concerns the correct application of a principle or practice whose meaning and scope has already been determined by a higher court, then it does not satisfy r 52.13(2)(a).’

An appellant cannot get around this restriction, Dyson LJ stressed, by saying that the question whether an established point of principle or practice has been properly applied in an individual case itself raises an important point of principle or practice. Though it may be difficult in some cases to know where an incorrect application of an established principle ends and the establishment of a new principle begins, the Court of Appeal’s restrictive approach is fairly clear.

[19.22] What may be less clear is the scope of the safety valve incorporated in CPR 52.13(2)(b), to the effect that even absent an important point of principle or practice a second appeal may be entertained if ‘there is some other compelling reason for the Court of Appeal to hear it’. It was argued in *Uphill v BRB* that there will always be a compelling reason where it is necessary in order to correct a plain injustice. The Court of Appeal did not find this formulation particularly helpful. Instead, it provided guidelines for the approach to be taken. There are essentially three crucial factors to be considered (at [24]). The first is the prospects of success. Clearly, there would normally be no ‘compelling reason’ for a second appeal if it is bound to fail. The court will normally require very high prospects of success. ‘This necessary condition will be satisfied’, Dyson LJ explained, ‘where it is clear that the judge on the first appeal made a decision which is perverse or otherwise plainly wrong. It may be clear that the decision is wrong because it is

inconsistent with authority of a higher court which demonstrates that the decision was plainly wrong.' However, even very high prospects of success would not necessarily be sufficient. Whether a high prospect of success will be sufficient would depend on the second factor: the reason why the court below reached a decision that is highly likely to be reversed on appeal. If the appellant himself contributed to the court's mistake, there will be no 'compelling reason' to entertain the appeal. 'For example,' Dyson LJ said, 'if it is the appellant's fault that the first appeal was dismissed, because he failed to refer to the authority of a higher court which demonstrates that the decision on the first appeal was wrong, the court may conclude that justice does not require this court to give the appellant the opportunity to have a second appeal'. The appeal in this case failed on this last ground. After the trial judge circulated a draft judgment, but before it was perfected, the Court of Appeal gave judgment in another case which vindicated the defendant's position. Yet the defendant failed to draw this decision to the judge's attention. Dyson LJ said that this failure negated what might otherwise have been 'compelling reason' to entertain a second appeal.

[19.23] Lastly, a compelling reason may on occasion exist even if the prospects of success are not very high. The third factor is concerned with defects in the process of the court below. Such a defect may occur where the judge did not allow the appellant to present his case. In such a situation Dyson LJ said (at [24]):

'the court might conclude that there was a compelling reason to give permission for a second appeal, even though the appellant had no more than a real, as opposed to fanciful, prospect of success. It would be plainly unjust to deny an appellant a second appeal in such a case, since to do so might, in effect, deny him a right of appeal altogether.'

The last sentence provides the key to understanding the third factor. If a procedural defect was alleged to have taken place at the trial and was the basis for a first appeal, it cannot count as a 'compelling reason' for a second appeal, unless of course the appellant can fulfil the first condition above. The procedural defect that can count as a compelling reason must have occurred in the process of the first appeal. (See also [17.55] above.)

Reopening an appeal to avoid injustice

[19.24] In *Taylor v Lawrence* [2002] EWCA Civ 90, [2002] 2 All ER 353 it was held that the court had residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The limited scope of this restriction was reiterated in *Re Uddin (a child) (serious injury: standard of proof)* [2005] EWCA Civ 52, [2005] 3 All ER 550, where the Court of Appeal stated that the probability of a significant injustice must be clearly established and that there be no effective alternative remedy. The jurisdiction can only be properly invoked where it is demonstrated that the integrity of the

earlier litigation process, whether at trial or at the first appeal, has been critically undermined. It is therefore not enough to show that the earlier process produced a wrong result. It is only the corruption of justice that can relegate the high importance of finality in litigation to second place. The requirements as to evidence are much more stringent than those applicable to adducing fresh evidence on appeal. If the discovery of fresh evidence is to justify reopening a concluded appeal the injustice that would be perpetrated if the appeal were not reopened must be so grave as to overbear the pressing claims of finality in litigation. Further, such evidence must demonstrate a powerful possibility that such a result has in fact been perpetrated.

Costs

Effect of CPR Part 36 offers without payment in

[19.25] NHS authorities are subject to many suits nowadays and like any repeat player they seek to devise measures to increase the efficiency of their litigation systems and save money. One of the problems that they face concerns CPR Pt 36 payments. For the need to make such payments can put a strain on their budgets. They have therefore developed a standard offer form designed to reap the benefits of a CPR payment without actually making any payment. Such offers are expressed to be made pursuant to Pt 36 and state:

‘This offer is open for 21 days from the date you receive this letter ... We also agree to pay the Claimant’s reasonable costs up until acceptance of it on or before the same date. Should your client decide to accept this offer after ... [the 21-day period] then we will agree he may do so only on the basis that your client will be responsible both for their own costs and for our reasonable costs thereafter or we otherwise agree liability for costs or with leave of the court. Please note that we do not intend to pay the amount of our offer into court. Please further note that as we are a public authority you should be in no doubt that we will pay the amount of our offer if the claimant accepts it in accordance with the terms on which we make the offer.’

[19.26] The consequences of such offers were considered in *Crouch v King’s Healthcare NHS Trust* [2004] EWCA Civ 1332, [2005] 1 All ER 207. Waller LJ’s starting point (at [26]) was that:

‘it certainly is not open to any defendant to decree unilaterally that where a money claim is being made against it, it will not make a payment into court but will make a written offer on the basis that Pt 36 will apply as though he had made a payment into court. Part 36 is quite clear that in relation to money claims, to have the consequences that flow from Pt 36 a payment into court is required.’

However, he thought that parties could by agreement treat an offer in writing as if it were a payment into court so as to bring into play the Pt 36 consequences. But to reach this result, he stressed, there has to be a clear

agreement by the claimant that he does accept that the defendant need not pay into court on the basis that the Pt 36 machinery will apply, following which the defendant has acted in reliance on that agreement and not paid into court. Such an agreement, he explained, should include some express reference to the offer being incapable of being withdrawn without the permission of the court. No such agreement existed in this case. However, there was a second way of achieving this result. Waller LJ explained (at [28]) that an NHS trust could 'take an offer letter to the court and seek a direction that it should be treated as a Pt 36 payment with the consequences which flow from that being so'. He thought that such direction could be given under CPR 36.1(2). But he noted that the defendant trusts were reluctant to have to incur the expenditure of going down this route if it can be avoided.

[19.27] Given that neither the agreement route nor the direction route were practical or attractive, the question boiled down to what should be the court's attitude at the conclusion of proceedings when considering the question of costs when it is established that an NHS trust has made the kind of offer described above. On this point Waller LJ was quite clear that, by virtue of CPR 44.3, an offer to settle a money claim without payment in must be taken into account, along with all the other circumstances, when considering what costs order to make. On the question whether such offer should be treated as payment in Waller LJ said (at [45]):

'In exercising a discretion ... it seems to me that the court is entitled to take into account the factors that the NHS trust will stress in their latest standard letter [that since payment is assured in the event of acceptance, it is better that in the meantime the trust should use the money for healthcare rather than payment in] ... Essentially the trust is bound to be good for the money. This form of offer from an NHS trust is as sound as a payment in, and, unless there is some factor special about the circumstances of the case, a court should treat such an offer in the same way as a payment in.'

It would therefore appear that some defendants may, after all, refrain from making payment into court in a money claim and still be confident in having the protection normally accorded to Pt 36 payment. This conclusion is inevitable, given the combination of CPR 36.1(2) and CPR 44.3. The former gives the court the power to direct that an offer to settle outside Pt 36 should have the consequences specified in the rule. The latter requires the court to take into account any offer to settle (even outside Pt 36) when making a costs order. This procedure of 'virtual Pt 36 payments' cannot be limited to NHS trusts or even public bodies. It invites any defendant of sound reputation and ample resources to structure their offers free of the constraints of Pt 36 while at the same maintaining Pt 36-type protection.

[19.28] A different question of the effect of offer without payment in arose in *Trustees of Stokes Pension Fund v Western Power Distribution*

(*South West*) plc [2005] EWCA Civ 854, [2005] 3 All ER 775. The defendants made a pre-proceedings offer of some £35,000 to settle 'without prejudice save as to costs', in accordance with CPR 36.10, which was stated to be open for acceptance for 21 days. But when it was not accepted within that time it was withdrawn. When proceedings commenced, the defendants paid £20,000 into court. In the event the claimants obtained judgment for £25,000. They had beaten the payment in, but not the pre-proceedings offer, which lapsed after the 21-day period for acceptance. The Court of Appeal held that an offer to settle a money claim under CPR 36.10 should usually be treated as having the same effect as a payment into court, if the conditions of CPR 36.10 were satisfied, even though the offer was withdrawn when the 21-day period for acceptance had expired. Here the defendants had satisfied the conditions and were therefore entitled to the benefit of the cost protection from the end of the 21-day period, notwithstanding that the offer was not open thereafter and that the subsequent payment into court was lower than the eventual award. However, the court seems to have left open the question of what would have been the position had the claimant shown that he would have accepted the original offer if it had not been withdrawn.

Costs consequences of refusal to allow late acceptance

[19.29] A defendant who has failed to improve on a Pt 36 offer made by the claimant will normally be ordered to pay indemnity costs and enhanced interest on costs from the time that the offer ceased to be capable of unilateral acceptance. But suppose that the defendant seeks to accept the offer after the 21-day period and the court refuses permission. Such defendant may well feel aggrieved if, having been willing to accept the offer, he is not only forced to go on with the litigation but is also visited with the Pt 36 consequences reserved for those who have failed to accept a Pt 36 offer to settle and have failed to beat the offer. This situation was confronted by the Court of Appeal in *Capital Bank plc v Stickland* [2004] EWCA Civ 1677, [2005] 2 All ER 544.

[19.30] The claimants sued the defendant for delivery up of a ship or payment of its value. They made a Pt 36 offer for £85,000. The defendant disputed the identity of the ship and did not accept the offer. The claimants obtained several orders directing the defendant to allow inspection of the ship in order to determine its identity, but the defendant did not comply with the orders. When the claimants managed to obtain a report proving the identity of the ship, the defendant applied for permission to accept out of time. The claimants resisted the application. The judge found that the strength of the claim had altered for the better and that, in any event, the defendant failed to offer any security for payment of the £85,000. He refused permission. The claimants obtained judgment in excess of their offer and the defendant was ordered to pay indemnity costs and enhanced interest on costs from the end of the acceptance period.

[19.31] On appeal, the defendant argued that it was illogical for the court to allow a claimant to retain the benefit of a Pt 36 offer while refusing a defendant permission to accept it late. Either the defendant should be allowed to accept the offer late or the claimant should be required to withdraw or reduce it. Longmore LJ rejected this submission (at [14]):

'For my part I can see no justification for requiring a claimant making a Pt 36 offer to withdraw or reduce his offer (or to be treated as having done so) as a condition of his opposing a defendant's application for late acceptance of the offer. That would be an impermissible gloss on the rules. Similarly I can see no justification for requiring a defendant who has made a payment into court to make an application that such payment be withdrawn or reduced (or to be treated as having done so) as a condition of his opposing a claimant's application to accept late the payment-in which has been made.'

The next question that the Court of Appeal had to consider was how the court should approach an application to accept a Pt 36 offer out of time that is resisted by the offeror. On this point Longmore LJ stated (at [16]):

'I would not therefore seek to limit in any way the extent of the discretion of a judge who has to consider whether a Pt 36 offer or a payment into court can be accepted after the expiry of the period of 21 days. Both the timing of the application and the ready availability of the defendant's money may well be relevant considerations. If a change of circumstance has occurred that will also be a relevant consideration.'

He pointed out that both the fact that the application to accept was made on the eve of the trial and the fact that it was not supported by security for payment were relevant factors, alongside the change of circumstances. The judge was also entitled to take into account the defendant's obstructive attitude to the claimants' attempts to discover the identity of the ship.

[19.32] A more troublesome aspect of this decision concerns the calculation of costs where a defendant has been refused permission to accept a Pt 36 offer out of time and the claimant obtains at the trial a more beneficial judgment than his Pt 36 offer. Longmore LJ drew help from *Garner v Cleggs* [1983] 2 All ER 398, and stated (at [23]):

'If one applies *Garner v Cleggs* to the case of a claimant's Pt 36 offer which the court declines to allow a defendant to accept after the 21-day period, it would become relevant to inquire when the claimant could have successfully opposed an application by the defendant to accept the offer. That would in this case be on or shortly after 11 February 2004, the date on which [the bank received a report about the identity of the ship] and Mr Stickland [the defendant] could, in theory, have submitted that any costs awarded to the claimants should be on an ordinary basis after that date. In fact, however, the bank did not then (or at any time) withdraw its offer and, on the facts of this case when an unsuccessful application to accept the Pt 36 offer was in fact made, I would myself say the critical date would be the date

on which the application was, in fact, refused by the court, rather than a notional date a few days earlier. Be that as it may, no application was made to the judge in relation to costs incurred after 11 February and I would not interfere with the judge's exercise of discretion in relation to costs incurred after July 2003 any more than the court was inclined to do in *Garner's* case itself.'

Mance LJ agreed. He explained that since the claimants in this case never withdrew their offer, they therefore started with a *prima facie* entitlement to all their costs, unless the court considered it 'unjust' to make such an order: CPR 36.21(4). However, he added (at [26]) that the fact that 'the claimants were after 11 February 2004 able to (and did) successfully resist late acceptance of their offer was a factor that the court might, if asked, have taken into account, when deciding whether this was unjust'. He went on to conclude (at [28]):

'By parity of reasoning [to *Garner v Cleggs*] here, if the defendant had raised the point, the judge might have considered it unjust for the defendant to have to pay indemnity costs in respect of all or some part of the period after the claimants on about 11 February 2004 received the report which was, in the judge's view, by itself sufficient to enable them to resist the defendant's late attempt to accept their offer on 27 February 2004, the day of trial. But, since this point was never raised before the judge, it cannot be known for certain what conclusions he would have reached either on the facts (for example, as to the likelihood or otherwise of the claimants in fact objecting to any late acceptance at all times after 11 February 2004) or on the justice of the case. In these circumstances, I agree that this appeal fails in its entirety.'

Applying this approach is problematic because it requires the court to engage in a hypothetical consideration of whether an application for late acceptance would have been resisted at some point in the past and, if so, whether the objection would have prevailed.

Party not allowed to benefit from another's mistake in making a Part 36 offer

[19.33] In *Hertsmere Primary Care Trust v Administrators of Balasubramaniam's Estate* [2005] EWHC 320 (Ch), [2005] 3 All ER 274 the claimants made a Pt 36 offer, which was defective in that it not state that the offer would remain open for 21 days, and did not state that the defendants could thereafter accept the offer only if the parties agreed the liability for costs or the court gave permission. The defendant indicated that the offer was defective, but despite requests from the claimants refused to elaborate. At the end of the trial when the claimant wished to reap the benefit of the offer, the defendant raised the objection for the first time. Lightman J held that the defendant was in breach of CPR 1.3 requiring parties to help the court to further the overriding objective, which included co-operating with each other. He concluded therefore that the defendants would not be allowed to take advantage of the claimants'

mistake, which they would have remedied had the defendant pointed it out. The claimants were therefore entitled to the benefit of the offer that they bettered at the trial.

Part 36 offers in split trials

[19.34] The fact that a Pt 36 payment has been made must not be communicated to the trial judge (CPR 36.19(2)). But it may be communicated to the judge, under CPR 36.19(3)(c) where: (i) the issue of liability has been determined before any assessment of the money claimed; and (ii) the fact that there has or has not been a Pt 36 payment may be relevant to the question of the costs of the issue of liability. In *HSS Hire Services Group plc v BMB Builders Merchants Ltd* [2005] EWCA Civ 626, [2005] 3 All ER 486 the Court of Appeal held that where the issue of liability has been decided first, the court should be told whether payment in has been made, but not its amount. If the court was told that there had been no payment in, then the court was free to exercise its discretion to award costs in relation to the preliminary issue there and then. If, however, it was told that there was a payment in, then the court should normally reserve the question of costs until after the determination of the remaining issues.

Costs orders against funders

[19.35] In *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655, [2005] 3 All ER 613 the claimant sued in respect of harm caused to him by the defendants' improper commercial practices, seeking compensation running into millions of pounds. He had no means and was represented on a conditional fee basis. The case required considerable expert assistance. Accordingly, MPC, a company in the business of the management and processing of compensation claims, agreed to fund expert evidence and the cost of organising documents on a contingent fee basis. In the event that the claim succeeded it would be paid a share of the damages recovered. The action failed. MPC provided support at the cost of some £1.3m. The defendants too incurred some £6m in costs, which they sought to recover from MPC. Colman J refused to order MPC to pay costs. He was of the view that as a matter of general policy it was highly desirable that impecunious claimants who have reasonably sustainable claims should be enabled to bring them to trial by means of non-party funding. He thought that if professional funders were to be subject to non-party costs orders, no funders would agree to help impecunious litigants gain access to court.

[19.36] Unfortunately, the Court of Appeal reversed Colman J's decision. Lord Phillips MR stated (at [37]):

'While we do not dispute the importance of helping to ensure access to justice, we consider that the judge was wrong not to give appropriate weight to the rule that costs should normally follow the event ... In our judgment

the existence of this rule [that the successful party is entitled to his costs], and the reasons given to justify its existence, render it unjust that a funder who purchases a stake in an action for a commercial motive should be protected from all liability for the costs of the opposing party if the funded party fails in the action.'

The Court of Appeal accepted that a just solution needed to be devised whereby, on the one hand, a successful opponent is not denied all his costs while, on the other hand, commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed. To achieve these objectives the Court of Appeal devised a solution for cases where: (a) a commercial funder has financed part of the costs of the litigation in a manner which facilitates access to justice and which is not otherwise objectionable; and (b) such funding leaves the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation. The Master of the Rolls stated the solution as follows (at [41]):

'a professional funder, who finances part of a claimant's costs of litigation, should be potentially liable for the costs of the opposing party *to the extent of the funding provided*. The effect of this will, of course, be that, if the funding is provided on a contingency basis of recovery, the funder will require, as the price of the funding, a greater share of the recovery should the claim succeed. In the individual case, the net recovery of a successful claimant will be diminished. While this is unfortunate, it seems to us that it is a cost that the impecunious claimant can reasonably be expected to bear. Overall justice will be better served than leaving defendants in a position where they have no right to recover any costs from a professional funder whose intervention has permitted the continuation of a claim which has ultimately proved to be without merit.'

[19.37] The idea that funders will provide litigation support under such conditions is quite unrealistic. But even if it were, this could be achieved only by breaking the two above conditions laid down by the Court of Appeal as vital to the legitimacy of such arrangements. If funders required a much higher stake than the claimant's eventual entitlement, as the Court of Appeal envisaged, the claimant's won interest in the outcome may be so diminished that the claimant's access to justice is virtually cancelled out by the sacrifice he has had to make in order to obtain it. Furthermore, if the funder's stake represents a large proportion of the claimant's entitlement, it would be illusory to assume that the claimant would still retain control over the conduct of the litigation. Put differently, where the funder becomes the main beneficiary of a successful outcome and carries the entire risk for an unsuccessful outcome, he is hardly likely to allow the claimant a free hand in the conduct of litigation. The reality of the matter is that claimants in the position of the present claimant would no longer be able to obtain the kind of assistance that MPC provided here and for which it was landed with a bill for £1.3m.

CFAs in claims for defamation

[19.38] The CFA legislation continues to be a source of much controversy. In *Campbell v MGN Ltd (No 2)* [2005] UKHL 61, [2005] 4 All ER 793, the claimant, a famous supermodel, sued the defendant newspaper for breach of confidence. She was successful in the High Court and was awarded a modest sum in damages and costs. The Court of Appeal reversed that decision. The House of Lords reversed the decision of the Court of Appeal and restored the order of the trial judge's modest award of damages. The newspaper was ordered to pay the claimant's costs in the three courts. The claimant's appeal to the House of Lords was conducted with CFA, under which her solicitors were entitled to a 95% success fee and counsel to 100%. The total costs exceeded £1m, over half of which were in respect of the appeal to the House of Lords. In advance of the costs assessment, the defendant petitioned the House of Lords for a ruling that the success fees should be disallowed on the grounds it amounted to an interference with the right to freedom of expression under ECHR, art 10. It argued, first, that the success fee rendered the costs so disproportionate as to create a chilling effect on the right of free expression, and, secondly, that the success fee served no legitimate purpose since it was not needed in order to give the claimant access to a court because she could have afforded to fund her own litigation.

[19.39] The House of Lords rejected both arguments. The court's starting point was that the availability of legal services under a CFA serves the legitimate objective of providing access to a court as required by ECHR, art 6 and that it was open to the legislature to choose to fund access to justice in this way, provided its effect on freedom of expression was not disproportionate. The House of Lords was satisfied that the CFA legislation was proportionate. It rejected the second ground of appeal because it held that under the legislation CFAs were made available to all, regardless of means. Consequently, the newspaper was held liable to pay the success fee.

[19.40] Before CFA legislation, only the very rich were able to pursue remedies for the infringements of their rights by newspapers because the costs of litigation, especially in defamation proceedings, were exceedingly high. The CFA legislation has certainly opened the way for even the impecunious to sue newspapers, albeit at a considerable cost to the newspaper industry. There is, therefore, an element of poetic justice in the present state of affairs which puts the boot on the other foot. But, unfortunately, it is not only newspapers that face the risk of having to pay a success fee that could double the reasonable and proportionate costs. All defendants faced by CFA claimants carry this risk. The justification given for the CFA legislation is that it provides persons of limited means with access to justice, but serious questions arise about the legitimacy of this method of funding the litigation of the poor. First, the House of Lords decision in *Campbell v MGN* has decoupled the availability of CFA from

any criterion of personal financial means. Secondly, it is open to doubt whether requiring defendants effectively to fund claimants' access to justice is compatible with ECHR, art 6 (see my note in (2005) 24 CQJ 1, and Ashby and Glasser 'The legality of conditional fee uplifts' (2005) 24 CQJ 130). It is difficult to see how it can be just to require an individual defendant, who may be in no better position to shoulder the burden, to pay extra in order to pave the claimant's path to court. The way in which the success fee is calculated adds to the potential injustice. The magnitude of the success fee is a function of the strength of the claimant's case. The weaker the claimant's case, the higher the risk that the claimant's solicitor is running and therefore the higher the success fee to which he is entitled. It follows that the more reason that a defendant has to resist the claim the harder he would be hit if he loses. Having said that, the real problem concerning access to justice in England and Wales is not caused by the CFA legislation. It is rooted in the inherently high and disproportionate cost of litigation in England. Yet, while the core problem of high costs persists, any attempt to devise a fair system of allocating the exorbitant costs between the different participants in legal process is bound to fail.

Costs in respect of pre-action protocol activity

[19.41] In *McGlenn v Waltham Contractors Ltd* [2005] EWHC 1419 (TCC), [2005] 3 All ER 1126 Judge Peter Coulson QC dealt with an interesting point. A defendant in a building dispute claimed the costs incurred in having to respond to claims made by the claimant at the pre-action protocol stage, but which the claimant did not pursue in the subsequent proceedings. The issue was whether such costs were recoverable as costs 'incidental to' the proceedings within the meaning of s 51 of the Supreme Court Act 1981. He held that costs incurred by a defendant at the pre-action protocol stage in successfully persuading a claimant to abandon a claim were not costs 'incidental to' any subsequent proceedings. As a matter of policy, he thought, it would be wrong to penalise a claimant for abandoning claims which the defendant had demonstrated were not going to succeed, because to do so would penalise the claimant for doing the very thing which the protocol was designed to achieve.

Prospective costs orders

[19.42] For protective costs orders, see *R (on the application of Corner House Research) v Secretary of State for Trade* [2005] EWCA Civ 192, [2005] 4 All ER 1 (discussed at [1.3]–[1.54] above) and *R (on the application of Ministry of Defence) v Wiltshire and Swindon Coroner* [2005] EWHC 889 (Admin), [2005] 4 All ER 40 (discussed at [1.55] above).

[19.43] Qualifying note: there have been a number of court decisions on limitation, but they have been left out partly for reasons of space and partly because some of them are discussed in other chapters.

Prisons

I M YEATS, BCL, MA

Barrister, Senior Lecturer in Law, Queen Mary, University of London

[20.1] In *R (on the application of Smith) v Parole Board*, *R (on the application of West) v Parole Board* [2005] UKHL 1, [2005] 1 All ER 755 the House of Lords considered the procedure to be followed by the Parole Board when considering whether to revoke the licences of determinate sentence prisoners. West was a short-term prisoner and Smith a long-term prisoner as defined by s 33(5) of the Criminal Justice Act 1991. They had both been released on licence at the appropriate stage in their sentences, but their supervising probation officers had been concerned about certain aspects of their behaviour and recommended their recall to prison. The Parole Board, following the procedures set out in s 39 of the 1991 Act, recommended that the licence be revoked and that they be returned to prison. They were both allowed to make written representations and given reasons for their recall. Neither was allowed to make oral representations, although West's solicitors had suggested that such a hearing would be appropriate in his case. The claimants argued that such prisoners should be allowed the opportunity of an oral hearing, relying both on the developing common law principles of fairness and on ECHR, arts 5 and 6. The Parole Board did not deny that an oral hearing would be appropriate in some cases and was granted, particularly where there were disagreements on issues of fact that could be resolved only by hearing what the parties had to say, but did not accept that there was a need for such a hearing in the present cases. The House of Lords held that fairness required an oral hearing, not in every case, but in a wider range of situations than the Board was prepared to accept, and that those situations included the cases of both West and Smith.

[20.2] Under s 39 of the 1991 Act prisoners were entitled to make written representations and informed of their right to do so, but there was no statutory entitlement to make oral representations. Section 32 provided for oral hearings in some classes of case, but these did not include the categories of short- and long-term prisoners. These statutory arrangements would seem to rule out any automatic entitlement to oral hearings, but the express provisions for such hearings in some categories was not taken to prevent the application of the common law principles of procedural fairness where important interests were at stake. The claimants had a statutory, though conditional, right to be free after serving the specified part of their sentence. In ensuring that such right was respected, oral hearings might be needed in wider groups of cases than those where

the facts were not agreed, especially as the Parole Board had applied this proposition in such a way that, in the period ending on 31 October 2004, oral hearings had been held only for four of the 1,945 cases of determinate sentence prisoners (figures that appeared to Lord Hope of Craighead (at [66]) 'to indicate that there is a long-standing institutional reluctance on the part of the Parole Board to deal with these cases orally'). In particular, oral hearings might be needed where, although the primary facts were agreed, the prisoner might be able to put forward an explanation or qualification that could not be fairly considered without oral presentation, and further, only at an oral hearing would the prisoner be able to tailor his arguments to any special concerns that were troubling the Board. The implications of the decision for the time and resources of the Parole Board might be considerable. Lord Hope suggested (at [68]) that there should be a clearing system to identify cases where it was necessary to resolve such issues before a final decision was reached and said that: 'If it is, an oral hearing should be the norm rather than the exception.'

[20.3] This decision was reached on the basis of the common law principles of procedural fairness and without reference to the Convention. It was accepted that art 5(4) would entail keeping the lawfulness of the continued detention under review by an independent and impartial tribunal (such as the Parole Board), but that any tribunal which observed the common law principles of procedural fairness would thereby conduct its business in a manner that satisfied art 5(4). The House also had to consider the possible relevance of art 6 and the claimants argued that the decision under review was the determination of a criminal charge. This argument was rejected, principally because, as put by Lord Bingham of Cornhill (at [40]), 'a challenge to revocation of a licence may lead to detention imposed to protect the public but it cannot lead to punishment'. Alternatively, the claimants argued that the revocation of the licence amounted to the determination of their civil rights and obligations. A majority of their Lordships did not find it necessary to determine this aspect of the case, since it was a sufficient answer that the common law requirements adequately protected the claimants' interests. Lord Hope did consider the issue fully since, if the claimants' civil rights under art 6 were engaged, they would be entitled to all the specific requirements of art 6, and he decided (at [81]) that: 'the art 6 civil right is not infringed by proceedings of the kind that are in issue in this case, so long as the individual has access to the domestic courts to assert his right to liberty.'

[20.4] The Divisional Court was concerned with oral hearings in a different context in *R (on the application of Hammond) v Secretary of State for the Home Department* [2004] EWHC 2753 (Admin), [2005] 4 All ER 1127 (see also [10.60]–[10.63] above). Paragraph 11(1) of Sch 22 to the Criminal Justice Act 2003 provides: 'An application under paragraph 3 or a reference under paragraph 6 is to be determined by a single judge of the High Court without an oral hearing.' Both paragraphs

concerned persons receiving mandatory life sentences before 18 December 2003, para 3 with those whose tariff had already been fixed by the Home Secretary and para 6 with those where the Home Secretary had not yet acted on the judicial recommendation as to the tariff. From that date the task of fixing the minimum term of a life sentence was to be determined by an independent and impartial tribunal to comply with ECHR, art 6. Hammond, whose case fell under para 6, argued that para 11, by precluding an oral hearing, in any case was incompatible with that article. The Divisional Court accepted this argument and held that para 11 was to be construed so as impliedly to give the judge discretion to permit oral argument in individual cases, although, given that there had been a trial and that the trial judge's report would be available, this was unlikely to be common. The fact that para 14 permitted an appeal to the Court of Appeal from a decision under para 11, that the hearing there would be oral and that that court would have the power to admit evidence under s 23 of the Criminal Appeal Act 1968 was not sufficient to cure the procedural defect in para 11 itself.

[20.5] Procedural fairness also concerned the House of Lords in *R (on the application of Al-Hasan) v Secretary of State for the Home Department* [2005] UKHL 13, [2005] 1 All ER 927. Two prisoners had been charged with a disciplinary offence in that they had refused to obey a lawful order, namely to submit to a squat search ordered by the governor in two wings of the prison. The charges were heard by the deputy governor, who, unknown to the prisoners, had been present when the governor determined to issue the order for squat searches and had acquiesced in it. The prisoners' argument, rejected by the deputy governor, was that the order had been unlawful. In these circumstances the House of Lords held that there had been an appearance of bias. The deputy governor should either have stood down and allowed the charges to be heard by another governor, if necessary from another prison, or have explained that he had been present and secured the prisoners' agreement to his continuing to hear the charges. There are two important aspects of the case. The first is that the facts were unusual, and the decision depended on both the fact that the very issue before the deputy governor was whether the order had been lawful and on the fact that he had already given the order at least tacit consent. He might therefore be regarded as disposed to rule that the order was lawful. Lord Hoffmann emphasised that there was nothing improper in the ordinary way in charges being heard by someone who had knowledge of the background circumstances or who had a role in the drafting of the rules under which the charges were brought. Head teachers, managers in business and officers in the armed services were cited as examples where this would be a common occurrence. So there would have been nothing improper in the deputy governor's involvement if the prisoners had denied that they refused to obey or argued that they had a valid defence to the charge. The second important feature is that the decision was explicitly reached 'under

well established principles of common law' ([2005] 1 All ER 927 at [45]) and owed nothing to the Human Rights Act 1998, which had not been in force at the time the charges were heard.

[20.6] The judgment of Goldring J in *R (on the application of Napier) v Secretary of State for the Home Department* [2004] EWHC 936 (Admin), [2005] 3 All ER 76 was delivered after, and makes reference to, the decision of the Court of Appeal in *Al-Hasan*, but before that decision was reversed by the House of Lords, as noted above. Napier, a determinate sentence prisoner, had been found guilty of a disciplinary offence and received a penalty of 35 additional days. His request for legal representation at the disciplinary hearing had been refused. Following the decision of the European Court of Human Rights in *Ezeh v UK* (App No 39665/98) [2003] All ER (D) 164 (Oct), the Secretary of State had remitted the penalty of additional days in the case of Napier and other prisoners but had refused to quash the finding of guilt. As a result of the *Ezeh* ruling, the Secretary of State had accepted that the proceedings had involved the determination of a criminal charge and therefore Napier had been entitled to legal representation to comply with ECHR, art 6. Napier now argued that it was insufficient to remove the penalty and that it was necessary also to expunge the finding of guilt. Goldring J, however, ruled that it was only the imposition of the additional days that imparted the characteristic of criminal proceedings. Without that punishment the decision was merely an administrative decision, relevant to the prisoner's future management in prison, and the finding of guilt alone did not involve the determination of a criminal charge.

Restitution

JAMES EDELMAN

Fellow and Tutor in Law, Keble College, Oxford

CHARLES MITCHELL

Professor of Law, King's College London

Introduction

[21.1] The material in this survey is arranged in line with the following precepts. Restitution can be a response to various events, including consent, unjust enrichment, and wrongdoing. Within unjust enrichment, the sequence of questions to be addressed is as follows: whether the defendant was enriched; whether his enrichment was gained at the claimant's expense; whether his enrichment was unjust; what rights the claimant therefore acquired; and whether there are defences to his claim.

Consent

[21.2] The view that restitutionary liabilities can derive from consent was borne out by two cases this year. One was *Swiss Reinsurance Co v United India Insurance Co Ltd* [2005] EWHC 237 (Comm), [2005] 2 All ER (Comm) 367, where Morison J noted that the express or implied terms of an insurance policy may provide for a refund of premium in the event that coverage ends prematurely, but concluded that no such entitlement had arisen on the facts of the case (see also [3.27] above). The other was *Governor and Company of the Bank of Scotland v Alfred Truman (a firm)* [2005] EWHC 583 (QB), [2005] All ER (D) 306 (Mar), where the defendant owed a contractual restitutionary liability to the claimant bank under a merchant services agreement which the parties had entered in connection with a credit card scheme.

[21.3] Credit card schemes all work in a similar way. When a card holder uses the card to pay for goods or services supplied by a merchant, the merchant submits data relating to the transaction to a merchant acquirer (typically a bank), which pays the amount of the transaction into the merchant's nominated bank account, and submits the data to the card issuer. The card issuer pays this amount to the merchant acquirer and looks to the card holder for payment. Neither the merchant acquirer nor the card issuer is involved with the underlying transaction between the card holder and the merchant, and neither is in a position to resolve disputes between them, given the large number of transactions which they handle. Credit card schemes therefore operate a chargeback mechanism to deal swiftly with disputes between card holders and merchants. If a card

holder complains to the card issuer that he has not received goods or services for which he has paid, or that an unauthorised transaction has appeared on his statement, then the card issuer will chargeback the transaction to the merchant acquirer, which will pass on the chargeback to the merchant. If the merchant can show that he was entitled to the payment, then the merchant acquirer will re-present the transaction to the card issuer and further enquiries will be pursued; if not, then the merchant will typically be liable to repay the merchant acquirer under the terms of the merchant services agreement.

[21.4] In the *Bank of Scotland* case, the defendant merchant sought to avoid repaying the claimant bank on the ground that the relevant clauses of their agreement operated as a penalty because the bank might make an unwarranted profit if it recovered from the merchant and was able to keep the card issuer's payment as well. On the facts there was no chance of this happening as it was clear that the bank had been obliged to reimburse the card issuers in respect of all the relevant underlying transactions. But Ian Hughes QC, sitting as a deputy High Court judge, would have rejected the argument anyway, ruling (at [120]) that a term could be implied into the merchant services agreement, to the effect that if 'the bank receives payment from the card issuer in respect of a disputed transaction, that payment, less the contractual interest, would be passed on to the merchant'.

[21.5] This finding can be compared with dicta in *Tradigrain v State Trading Corporation of India* [2005] EWHC 2206 (Comm), [2005] All ER (D) 206 (Oct). Here the seller was required by a contract for the sale of wheat to put up a performance bond in the amount of 5% of the contract value. The seller arranged for the State Bank of India (SBI) to issue a bond, which was backed by a counter-guarantee issued by the seller's bank (UBS). After the wheat was delivered, the buyer alleged that it was not of contractual quality, and made a claim against the seller for around \$800,000. The seller would only admit liability for approximately \$100,000, and the parties went into arbitration. In the meantime, the buyer required SBI to pay the full amount of the bond (around \$900,000). SBI requested UBS to pay it the same amount under the counter-guarantee, but the seller obtained an ex parte injunction ordering UBS not to pay SBI, and also refused to repay SBI itself. The arbitration board ruled that that the buyer's invocation of the bond had been unjustified, and that the buyer should compensate the seller for any loss which it had suffered as a result of the buyer's wrongful call. However, the board also held that the seller had suffered no loss because it had paid nothing to SBI or UBS. In the board's view, it followed that the buyer was not obliged to pay the seller the difference between the amount it had received from SBI (\$900,000) and the amount of its own loss (\$100,000).

[21.6] The seller successfully appealed from this ruling to the High Court, where Christopher Clarke J ordered the buyer to pay the seller the

amount by which it had been over-compensated by SBI's payment. He held (at [26]) that the seller's entitlement derived from –

'an implied term in the contract of sale that the buyers will account to the sellers for any amount that has been paid under the bond to the extent that the amount paid exceeds the true amount of the buyers' loss. The amount is due to the sellers as a debt, whether or not the sellers have indemnified either the paying bank or the indemnifier of the paying bank. In essence this is because, by calling for too much under the bond, the buyers have procured payment to themselves from the paying bank (acting, for this purpose, on the sellers' behalf) of an amount that is not due, and must, obviously, return it to their contractual counterparty from whom they should not have procured it in the first place.'

[21.7] Given his Lordship's view that the paying bank had acted as the seller's agent, he could have used unjust enrichment reasoning to reach the same conclusion, since this must have meant that the buyer's enrichment was ultimately acquired at the seller's expense. Analogous claims by customers to recover payments made by banks on their behalf are discussed in C Mitchell 'Banks, Agency, and Unjust Enrichment' in J Lowry and L Mistelis (eds) *Commercial Law: Perspectives and Practice* (2006), chapter 6.

[21.8] His Lordship's words should also be read alongside Morison J's judgment in *Cargill International SA v Bangladesh Sugar and Food Industries Corp*n [1996] 4 All ER 563, which makes it clear that a seller such as the claimant in *Tradigrain* must account for the money he recovers from the buyer, either to the bank which issued the bond, or to the bank which issued the counter-guarantee, to the extent that it is the bank rather than the seller which has been left out of pocket by the buyer's wrongful invocation of the bond. In Morison J's words (at 571):

'if there has been a call on a bond which turns out to exceed the true loss sustained, then the party who provided the bond is entitled to recover the overpayment. It seems to me that the account party may hold the amount recovered in trust for the bank, (where, for example, the bank had not been paid by him) but that does not affect his right to bring the claim in his own name.'

Morison J's decision was affirmed on appeal ([1997] EWCA Civ 2757, [1998] 2 All ER 406), and was also the subject of approving comment in *Comdel Commodities Ltd v Siporex Trade SA* [1997] EWCA Civ 925, [1997] 1 Lloyd's Rep 424. In *Tradigrain*, Christopher Clarke J pointed to these authorities (at [33]) to explain why the seller would not receive a windfall benefit if the buyer were ordered to pay over money which should ultimately go to SBI. He did not decide whether the seller would hold this money on trust for SBI, or merely owe a personal obligation to account for an equivalent sum. Arguments supporting the imposition of a trust in analogous cases are considered in G McMeel 'Complex Entitlements – The *Albazer* Principle and Restitution' [1999] RLR 20.

Unjust enrichment

Enrichment

[21.9] Several cases were noted last year (All ER Rev 2004 at [21.22]–[21.23]), in which payments were made into joint bank accounts, and the question arose whether the account holders should be treated as one for the purposes of determining whether they were enriched, and whether they were entitled to raise separate defences. Another case of this sort is *OEM plc v Schneider* [2005] EWHC 1072 (Ch), [2005] All ER (D) 413 (May), where Peter Smith J held (at [47]) that money paid into a joint bank account enriches both account holders, and that if one wishes to escape liability in unjust enrichment by arguing that the account was used by the other as a conduit for channelling money into schemes of his own, then that is not an argument going to enrichment, but an argument going to defences (agency and/or change of position).

At the claimant's expense

[21.10] It is often obvious that a defendant has been enriched at a claimant's expense because the defendant is the immediate recipient of a benefit conferred by the claimant. But should a claimant ever be permitted to leapfrog the immediate recipient of a benefit gained at his expense, to claim against a remote recipient to whom the immediate recipient has passed the benefit? English authorities on this point are sparse, but as Peter Birks observed in his last book, *Unjust Enrichment* (2nd edn, 2005) at pp 89–91, there seems to be one common case where leapfrogging is definitely ruled out, namely where the claimant pays money to the immediate recipient pursuant to a valid contractual obligation. In such a case leapfrogging would subvert the insolvency regime, for when the claimant contracts with the immediate enricher he takes the risk that he will not receive counter-performance in the event that the immediate enricher becomes insolvent.

[21.11] *Uren v First National Home Finance Ltd* [2005] EWHC 2529 (Ch), [2005] All ER (D) 146 (Nov) was a case of this kind. The defendant bank sought to develop a block of flats in Tenerife through a subsidiary company, Arrish Ltd. Alongside other intending purchasers, the claimant paid £50,000 to Arrish Ltd, but the company became insolvent. The defendant incorporated another subsidiary, Pitchcott Ltd, which acquired the property from the receivers at auction, and to keep the development going, the claimant then channelled a further £75,000 to Pitchcott Ltd. In exchange, ownership of Pitchcott Ltd was transferred to a third company, Santa Barbara Ltd, which was owned by the claimant and the other intending purchasers. The defendant made a \$2.5m loan to the latter two companies to enable the development to be completed. However, it

subsequently called in the loan, and sent in receivers, by whom the property was then auctioned to Agosta 96, another company owned by the defendant.

[21.12] In Mann J's view, the claimant could not establish that the defendant had been enriched at the claimant's expense on these facts, even if it were assumed that the defendant had contrived to bring about the Pitchcott and Santa Barbara receiverships in bad faith, and that Arrish and Pitchcott had successively spent the whole of the £125,000 paid by the claimant on improving the property that was now owned by Agosta 96. If the defendant had behaved as badly as alleged, then the Pitchcott receivers would have a claim against it. If the receivers failed to pursue this claim, then that would be unfortunate for the claimant, but in Mann J's words (at [28]):

'that misfortune cannot be overcome by seeking to fashion a remedy based on unjust enrichment in order to overcome the inconveniences of the chain of contracts and incorporation that exist in this case and which have their own consequences.'

Unjust

[21.13] A further problem for the claimant in the *Uren* case was establishing an unjust factor. The point has often been made that the courts' jurisdiction to order restitution on the ground of unjust enrichment is subject 'to the binding authority of previous decisions', and they do not have 'a discretionary power to order repayment whenever it seems in the circumstance of the particular case just and equitable to do so': *Kleinwort Benson Ltd v Birmingham City Council* [1996] 4 All ER 733 at 737 (Evans LJ). Hence, as Mann J held in the *Uren* case (at [16]–[18]), it does not suffice for pleading purposes for a claim to be 'phrased generally as a claim for unjust enrichment without bringing it within or close to some established category or factual recovery situation'. This does not mean that statements of claim must necessarily 'incorporate some particular form of words', but it does mean that facts must be specifically pleaded which are capable of bringing the case within one of the established restitutionary claims or some justifiable extension of them.

Mistake

[21.14] The scope of the unjust factor of mistake and its relationship with the policy motivated unjust factor of unlawful exaction of tax was considered by the Court of Appeal in *Deutsche Morgan Grenfell Group plc v IRC* [2005] EWCA Civ 78, [2005] 3 All ER 1025 (also discussed at [27.12] below). In 1993, 1995 and 1996, the Deutsche Morgan Group (DMG) made payments of income tax under a provision of the Income and Corporation Taxes Act 1988 (ICTA) which did not allow for those payments to be deferred because DMG did not have a UK parent company. In 2001 that provision was held, by the European Court of

Justice, to be contrary to the EC Treaty. DMG brought an action for restitution of the use value of the money (interest) for the period for which it would have deferred payment to the Revenue, had it been treated in the same way as a company with a UK parent.

[21.15] The Inland Revenue Commissioners resisted Deutsche Morgan's claim, arguing that it was time-barred. In relation to the 1995 and 1996 payments, a majority of the Court of Appeal held that the claim was made when the claim form was issued (October 2000) and therefore within the six-year time limitation for actions in unjust enrichment. But there was a problem in relation to the 1993 payment, because more than six years had expired by October 2000. DMG relied upon the decision of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513 to argue that its claim fell within an extension period in the Limitation Act 1980, s 32(1)(c), because it was seeking relief from the consequences of a mistake and the mistake could not have been discovered until the 2001 decision of the European Court of Justice. The Commissioners argued that DMG's only claim was for restitution of an enrichment conferred as a result of an unlawful exaction of tax (a policy-motivated unjust factor recognised by the House of Lords in *Woolwich Equitable Building Society v IRC* [1992] 3 All ER 737) and that it was not possible to rely, in the alternative, on the unjust factor of mistake. Therefore, they argued, the extended limitation period was unavailable because this was not relevantly an action involving 'relief from the consequences of a mistake'.

[21.16] The Court of Appeal unanimously accepted the Commissioners' argument. The leading judgment on this central issue was given by Jonathan Parker LJ, with whom Rix LJ concurred. He conducted an extraordinarily detailed and minute analysis of the House of Lords' decisions in *Kleinwort Benson* and *Woolwich*, particularly a passage in Lord Goff's leading speech in *Woolwich* in which his Lordship spoke of the mistake of law rule having 'no application where the remedy arises not from the error on the part of the taxpayer, but from the unlawful nature of the demand by the Revenue'. He concluded (at [208]) that Lord Goff had intended that when a payment was made pursuant to an unlawful exaction of tax, the extended limitation period was unavailable because a claim could not be brought for mistake of law. This is a very strained reading of Lord Goff's speech. A more natural reading is that claims founded on mistake of law are generally available, but that special defences may be available to public bodies. It is therefore a matter for regret that his Lordship ruled out common law claims to recover money paid as tax on the ground of mistake without undertaking any systematic analysis of the policy reasons for and against a rule to this effect.

[21.17] If this case reaches the House of Lords then it is hoped that their Lordships will give these matters the attention which they deserve; that they will address the argument that confining claimants to statutory

claims and *Woolwich* claims enables proper recognition of the hybrid public and private nature of claims to recover money paid as tax which is not due (for which, see R Williams 'The Beginnings of a Public Law of Unjust Enrichment?' (2005) 16 KCLJ 194). Their Lordships could also usefully consider whether the Court of Appeal was justified in assuming that a mistake must be an element of the cause of action before s 32(1)(c) can be brought into play. The statute itself places no such limitation on the subsection, and if its scope is not so limited then the applicable time period could have been extended even if the claimant had brought a *Woolwich* claim.

[21.18] An action in unjust enrichment based on mistake can arise in equity as well as at common law. In *Sieff v Fox* [2005] EWHC 1312 (Ch), [2005] 3 All ER 693 an appointment was made by trustees who had been incorrectly advised about the capital gains tax ramifications of the transaction (see also [16.30]–[16.39] above). Lloyd LJ set the appointment aside under the rule in *Re Hastings-Bass* [1974] 2 All ER 193. However, the alternative argument was also made that the appointment should be set aside for mistake, relying on cases where equity has allowed restitution of mistaken gifts where the mistake has been 'of so serious a character as to render it unjust on the part of the donee to retain the property given to him': *Ogilvie v Littleboy* (1897) 13 TLR 399 at 400 (Lindley LJ), affirmed sub nom *Ogilvie v Allen* (1899) 15 TLR 294. Against this, it was said that the situation was governed by *Gibbon v Mitchell* [1990] 3 All ER 338, where Millett J held (at 343) that voluntary dispositions may be set aside on the ground of mistake only where the donor's mistake is 'as to the effect of the transaction itself and not merely as to its consequences or the advantages to be gained by entering into it'. If that is right, then, as Davis J pointed out in *Anker-Petersen v Christensen* [2001] All ER (D) 54 (Oct), a misunderstanding as to the fiscal consequences of a transaction would not justify setting the transaction aside. However, in *Sieff* (at [106]) Lloyd LJ queried whether Millett J's test was right, doubted whether the effects/consequences distinction which he drew is workable in practice, and observed that Lindley LJ's test in *Ogilvie* is sufficiently broad to permit rescission where fiscal considerations have been overlooked.

[21.19] In any case, Lloyd LJ held that a wider test should apply to transactions entered by trustees than the test which applies to transactions entered by individuals. He reasoned (at [85] and [108]) that there are two significant differences between the two types of transactions: first, that trustees deal with assets belonging to others to whom they owe fiduciary duties and, secondly, that the fiscal treatment of trust property is much more complex than that applying to disposals by individuals. It may be doubted whether these differences constitute good reasons in themselves for a different rule to be applied in the two cases. Why should a beneficiary be placed in a stronger position than the absolute owner of property when he wishes to unwind a transaction to which he has given his consent, but which turns out to have unforeseen tax disadvantages?

Moreover, his Lordship's obiter preference for a wider test for mistake in the case of individual donors is in tune with the rule at common law, where the causative mistake test propounded in *Barclays Bank Ltd v W J Simms, Son and Cooke (Southern) Ltd* [1979] 3 All ER 522 is now well established: *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2001] UKPC 50, [2002] 1 All ER (Comm) 193 at [28].

[21.20] Mistakes can be made in the context of contracts as well as unilateral payments. It is uncontroversial that a claimant who enters a contract because of a mistake induced by the defendant is entitled to rescission ab initio and restitution of any money paid to a defendant pursuant to the contract. If a contract remains enforceable, however, payments made as a result of the claimant's mistake are usually irrecoverable: *Bell v Lever Bros Ltd* [1932] AC 161, [1931] All ER Rep 1. In *Axa General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112, [2005] 1 All ER (Comm) 445 (see also [3.16], [8.16] above) the defendants made four claims on their insurance company in six months. Some of the expenses relating to the first two claims were fraudulent. The insurer sought restitution of all payments made on all four claims despite the fact that the fraud only related to some of the payments made on the first two claims.

[21.21] The Court of Appeal accepted that there is a rule of law based upon deterrence of fraud that an 'insured who has made a fraudulent claim may not recover the claim which could have been honestly made', following *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd, The Star Sea* [2001] UKHL 1, [2001] 1 All ER 743, [2001] 1 All ER (Comm) 193 at [62]. Although a claim based on mistake will rarely succeed where a contract remains enforceable, Mance LJ held (at [27]) that the insurer was able to recover all payments on the first two claims which had been forfeit, relying on the unjust factor of failure of consideration rather than mistake. The insurer's claim for restitution of the payments made on the third and fourth claims failed because the fraud rule did not require claims made prior to the fraud to be forfeit (at [22]). Therefore, there was no failure of consideration in relation to those payments.

FAILURE OF CONSIDERATION

[21.22] The foundational decision for the unjust factor of failure of consideration which was relied upon in *Axa* is the House of Lords' decision in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122. There, Lord Wright explained that failure of consideration is part of the law of unjust enrichment. His Lordship said (at 138) that restitution is awarded for a failure of consideration because:

'the payment was originally conditional. The condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail.'

Two difficult questions were not answered by the House of Lords in that case and remain controversial. Can a claim for restitution be brought for the value of *services* performed when the condition or basis for performing the services fails? If so, can a claimant recover more than the total contract price for the services by claiming in unjust enrichment for failure of consideration?

[21.23] As to the first question, there are many cases where a quantum meruit award is made for the value of services performed where counter-performance has not been received, although the award is not explicitly acknowledged to be restitutionary and the basis for the award is not described as unjust enrichment. In the leading judgment in *Chandler Bros Ltd v Boswell* [1936] 3 All ER 179 at 186 Greer LJ said that 'it has long been well settled that a plaintiff whose contract is broken is entitled, if he so choose, to claim damages or claim on a *quantum meruit* basis'. However, unlike money claims, a claim for a quantum meruit has not traditionally been recognised as a response to a claim for failure of consideration. It has been suggested that such lack of recognition has led to anomalous results. In the Californian case *Boomer v Muir* 24 P 2d 570 (Cal App 1933) a contractor repudiated a contract with his sub-contractor, who claimed a quantum meruit for the value of the work done on the construction project. Although only a small amount of work remained to be performed, the sub-contractor was awarded restitution of the full value of his services, less payment received under the contract. The difference was \$238,000, which left him in a better position than if he had fully performed the contract. The decision was followed by the New South Wales Court of Appeal in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.

[21.24] In *Taylor v Motability Finance Ltd* [2004] EWHC 2619 (Comm), [2004] All ER (D) 341 (Nov) Cooke J considered these issues directly. Taylor was employed by Motability as a finance director. Although bonuses were given on a discretionary basis, Taylor's contract did not entitle him to a bonus as of right. In his role as finance director, Taylor was involved in the negotiation of a highly successful insurance settlement. Motability subsequently terminated his employment contract. In an alternative claim to breach of contract for wrongful termination of his employment, Taylor claimed restitution for the value of the work he did on the insurance settlement. He alleged that a negotiation consultant would have charged 0.5% of the settlement (£375,000). Cooke J treated this claim for the value of services conferred prior to Motability's breach of contract as a claim for restitution of unjust enrichment based on a failure of consideration. His Lordship struck out the claim, stating (at [25]) that in cases of this kind, a claim for an accrued contractual right or a claim for breach of contract –

'is the true measure of his entitlement, because it is that which he bargained for. If it were otherwise, not only would the claimant be able to recover more

than his contractual entitlement in respect of bonus, but he could also seek to establish that he was underpaid in terms of salary, despite his agreement thereto.'

[21.25] In reaching this conclusion, Cooke J relied upon three decisions of the House of Lords which established that a breach of contract terminates contractual rights *in futuro* but does not affect accrued rights: *Johnson v Agnew* [1979] 1 All ER 833; *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556; and *LEP Air Services Ltd v Rolloswin Investments Ltd* [1972] 2 All ER 393. His Lordship acknowledged, however, that a claim based on a total failure of consideration is different. The reason for this must be that the right to the payment or benefit does not fully accrue if the condition for retaining it is receipt of counter-performance.

[21.26] In obiter dicta, Cooke J went further, saying that even where a claim for restitution *is* available, the claim is limited by a contractual ceiling so that the decisions in *Boomer* and *Renard Constructions* would be decided differently under English law. The proposition that a claimant cannot recover more in unjust enrichment than the total value of the contract is attractive. But there is a strong argument that the contract price should not form a ceiling on restitutionary recovery by the claimant because the allocation of price and risk is usually settled on the basis that the contract will be entirely performed. A claimant might agree to a contract price based on expected intangible benefits from entire performance such as reciprocal treatment by the defendant, further contracts, or reputation. Hence there are reasons to prefer the contrary decision of the Privy Council in *Lodder v Slowey* [1904] AC 442 (which Cooke J did not discuss although it was cited to him).

NECESSITY

[21.27] In *Guildford Borough Council v Hein* [2005] EWCA Civ 979, [2005] All ER (D) 393 (Jul) the appellant council won two orders disqualifying the respondent from keeping dogs, and removed 26 German Shepherds from her custody. The orders expired but the council did not redeliver the dogs, as it was concerned that she would mistreat them and allow them to breed. Instead it applied for, and won, an injunction from the county court to restrain her from keeping any dogs at her premises except for three dogs of the same gender, and a declaration that unless she provided the council with suitable accommodation other than her own premises to which it could deliver the rest of the dogs, she would lose her ownership of these, and the council would become entitled as bailee to sell them, and to account to her for the proceeds. On appeal, the injunction was approved, but the declaration was discharged because the courts have no power under the Protection of Animals Acts 1911–1988 or the Breeding of Dogs Act 1973 to deprive dog-owners of their ownership, nor to make permanent arrangements for the dogs' care or disposal. This

hiatus in the legislation presented the court with an awkward question: what would happen if the respondent refused to make sensible arrangements for the dogs to be delivered to other people, with the result that the council was then effectively forced to incur kennelling costs, pursuant to its duty to take reasonable care of them? In this situation, held Clarke LJ (at [33] and [50]) and Waller LJ (at [80]), the council would be entitled to recover its costs from the respondent, by analogy with necessity cases such as *Great Northern Railway Co v Swaffield* (1874) LR 9 Ex 132 and *China Pacific SA v Food Corp of India, The Winson* [1981] 3 All ER 688.

SECONDARY LIABILITY

[21.28] The Civil Liability (Contribution) Act 1978, s 1(4) provides that claims can lie under the statute by those who have made or agreed to make ‘any payment in bona fide settlement or compromise’ of claims against them in respect of damage. In *Baker & Davies plc v Leslie Wilks Associates (a firm)* [2005] EWHC 1179 (TCC), [2005] 3 All ER 603 (see also [8.39] above) the question arose whether this wording covers the situation where a claimant agrees to carry out work to repair the damage in question. The defendant argued that it does not, and cited Judge Hicks QC’s comments to this effect in *George Stow & Co Ltd v Walter Lawrence Construction Ltd* (1992) 40 Con LR 57 at [253]. However, Judge Havery QC disagreed, and held that for the purposes of the subsection the word ‘payment’ includes payment in kind, at least where this is capable of valuation in monetary terms. This is a welcome finding. Assuming that the value of a claimant’s work can be fairly assessed, there is no reason to prevent him from recovering a contribution from a defendant whose liability to a third party he has discharged by doing the work – and, indeed, analogous claims for reimbursement have long been permitted at common law: see, for example, *Gebhardt v Saunders* [1892] 2 QB 452 and *Macclesfield Corp v Great Central Railway Co* [1911] 2 KB 528.

[21.29] *Brian Warwicker Partnership plc v HOK International Ltd* [2005] EWCA Civ 962, [2005] All ER (D) 386 (Jul) also concerned the 1978 Act. The claimant consulting engineers and the defendant architects were both liable in negligence for causing the same damage to a developer. The engineers paid the developer and sought a contribution from the architects. In the course of apportioning liability between the parties, the trial judge took into account various breaches of the architects’ duty of care towards the developer, which were not causally connected with the damage for which the parties were commonly liable. This led him to make an apportionment that was more heavily weighted against the architects than it would otherwise have been, and they appealed, arguing that the court is not authorised to consider such matters by s 2 of the 1978 Act. This provides that ‘the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in

question' (emphasis added). The architects construed these words to mean that the court can only review those features of the parties' conduct which bear on their responsibility for the damage. However, this construction of the section was rejected, and the judge's approach upheld, by the Court of Appeal, which was bound by a previous Court of Appeal decision on the point.

[21.30] This was *Re-Source America International Ltd v Platt Site Services Ltd (Barkin Construction Ltd, Pt 20 defendant)* [2004] EWCA Civ 665, [2004] All ER (D) 440 (May). Here a fire on a building site was negligently caused by a welder acting under the negligent supervision of a foreman. The foreman was employed by a contractor and the welder by a sub-contractor. In Pt 20 contribution proceedings between the contractor and the sub-contractor, the trial judge made a 100% apportionment against the contractor, after taking into account the behaviour of the foreman ([2003] EWHC 1142 (TCC), [2003] All ER (D) 143 (Jun) at [202]) in –

'instigating the hotwork originally in highly contentious circumstances, of his directing it in a wholly dangerous manner and of his deliberate decision to leave site as soon as he learnt that a fire had started so as to avoid criticism in these regrettable acts. This was then followed by a lengthy campaign in which he sought to show that he had left site earlier than he did and in innocent circumstances, that the fire was exclusively caused by the reckless conduct of [the sub-contractor] which he knew that [it] had not engaged in and which aimed to vindicate both [the contractor] and himself and unfairly leave [the sub-contractor] solely responsible, liable and culpable for the fire.'

The Court of Appeal affirmed this decision, Tuckey LJ stating (at [51]) that:

'Section 2 of the 1978 Act is not expressed exclusively in terms of causative responsibility for the damage in question, although obviously the court must have regard to this, as the section directs, and it is likely to be the most important factor in the assessment of relative responsibility which the court has to make. But in the result the court's assessment has to be just and equitable and this must enable the court to take account of other factors as well as those which are strictly causative.'

[21.31] As Arden LJ pointed out in *Brian Warwicker* (at [38]), the House of Lords had already taken a similarly wide view of s 2 when it held in *Dubai Aluminium Co Ltd v Salaam* [2002] UKHL 48, [2003] 1 All ER 97, [2003] 2 All ER (Comm) 451 that the court may take into account the fact that a defendant has made a profit out of his wrongful conduct. Nonetheless, *Re-Source* and *Brian Warwicker* are out of line with the well-established rule that the damages recoverable from a negligent defendant will be reduced under the (similarly worded) Law Reform (Contributory Negligence) Act 1945, s 1(1) only where the claimant's own negligence has been a cause of the claimant's damage: *Davies v Swan Motor Co (Swansea) Ltd* [1949] 1 All ER 620; *Jones v Livox Quarries Ltd*

[1952] 2 QB 608. Moreover, they produce the anomalous result that where D1 commits two breaches of duty, one of which causes no damage and the other causes damage for which D2 is also liable, D2 can point to D1's first breach as a reason for increasing his share of their common liability, even though the person to whom D1's duty was owed could not have sued him for it. Where a defendant has behaved badly by lying about his actions it is obviously tempting for the courts to mark their displeasure by making an apportionment which is weighted against him, and in fact Rix J did this at first instance in *Dubai* ([1999] 1 Lloyd's Rep 415), when he held it to be a relevant circumstance when apportioning liability between multiple defendants that some settled the claims against them quickly while others reprehensibly held out until after the initiation of court proceedings. However, it seems more appropriate for the court to respond to such behaviour when making costs orders between the parties.

Rights arising

[21.32] *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1979] 3 All ER 1025 decided that the recipient of a mistaken double payment holds the second payment on trust for the payer. Lord Browne-Wilkinson glossed this in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] 2 All ER 961 at 997, holding that the trust will be imposed only if the recipient's conscience is affected with knowledge of the payer's mistake at a time when the money or its traceable proceeds are still in the recipient's hands. He also asserted that a trust will be imposed on the proceeds of fraud from the moment when they reach the hands of the fraudster, a proposition which has since been doubted in various cases, including *Twinsectra Ltd v Yardley* [1999] EWCA Civ 1290, [1999] All ER (D) 433 at [99], and *Shalson v Russo* [2003] EWHC 1637 (Ch), [2003] All ER (D) 209 (Jul) at [106]–[119]. Nonetheless, the rule laid down in *Chase Manhattan*, as interpreted in *Westdeutsche*, remains good law, as Judge Chambers QC held in *Papamichael v National Westminster Bank plc and Paprounis (Pt 20 defendant)* [2003] EWHC 164 (Comm), [2003] All ER (D) 204 (Feb) at [221]–[231], and as Lawrence Collins J has now held in *Commerzbank Aktiengesellschaft v IMB Morgan plc* [2004] EWHC 2771 (Ch), [2005] 2 All ER (Comm) 564 at [36], stating that:

'Whether a person who has made a payment by mistake has a proprietary claim is by no means clear. But I am satisfied that in a case [like the present], where ... double payment was made at the request of the recipient ... where there is an identifiable fund, and where the recipient has notice of the claim, it would be unconscionable for [the recipient or his other creditors] ... to retain the benefit of that payment.'

Defences

LIMITATION

[21.33] *Deutsche Morgan Grenfell* (discussed at [21.14]–[21.17] above) was not the only case this year where the courts were asked to consider the limitation periods applicable to claims in unjust enrichment. Another was *Fea v Roberts* [2005] All ER (D) 69 (Sep), where the claimant executors paid money out of a testator's estate to the defendant in the mistaken belief that he was entitled to it under the will, having confused him with another person with the same name. The payment was made in 1995, and the mistake was not discovered until 2003, but the claimants argued that the normal six-year period for money claims in unjust enrichment did not apply, because the Limitation Act 1980, s 32(1)(c) postponed the inception of the limitation period governing their claim to the time when they had 'discovered the ... mistake ... or could with reasonable diligence have discovered it'. The defendant countered that the claimants could with reasonable diligence have discovered their mistake before they had even made the payment in 1995, suggesting that the claim was still statute-barred. However, Hazel Williamson QC, sitting as a deputy High Court judge, rejected this, holding that Parliament could not have intended that a claimant's want of reasonable diligence would start the clock running before the accrual of his cause of action when he paid the defendant. In her Ladyship's words (at [63]), the effect of such a rule would be that 'the running of time would never be postponed in the case of a claim to recover money paid under a careless mistake', yet there is no indication in the statute that careless mistaken payers should be treated differently from other types of mistaken payer for the purposes of the subsection.

[21.34] A third case concerned the Limitation Act 1980, s 10(3) and (4). Section 10 lays down a two-year limitation period for claims under the Civil Liability (Contribution) Act 1978. Section 10(3) provides that where the claimant has been held liable in respect of damage to a third party to whom the defendant was also liable in respect of the same damage, the limitation period shall start to run on the date when judgment is given against the claimant. Section 10(4) provides that in cases which do not fall within s 10(3), where the claimant 'makes or agrees to make any payment' to the third party, time shall start to run on the earliest date on which the claimant is liable to pay. Two years ago, in *Knight v Rochdale Healthcare NHS Trust* [2003] EWHC 1181 (QB), [2003] 4 All ER 416, Crane J had to decide where consent orders fit into this scheme. He held that a consent order can count as a 'judgment' for the purposes of s 10(3), but that where (as in *Knight*) the claimant is bound by the terms of a settlement regardless of whether a consent order is made, the situation falls within the scope of s 10(4). This decision was revisited in *Aer Lingus plc v Gildacraft Ltd* [2005] EWHC 1556 (QB), [2005] All ER (D) 278 (Jun). Here the claimant's employee was badly injured when his hand was

trapped in a document lift supplied and installed by the defendants. On 9 May 2001, he obtained a judgment against the claimant for damages to be assessed. Damages were subsequently assessed by an agreement embodied in a consent order on 3 October 2003. The claimant began contribution proceedings against the defendants on 4 February 2004, which pleaded a limitation defence, arguing that under s 10(3) the limitation period governing the claim had started to run on 9 May 2001, when judgment was entered against the claimant on liability. The claimant counter-argued that time had started to run on 3 October 2003.

[21.35] Simon J found for the defendant, rejecting the claimant's argument that where a claimant is contractually bound to pay a third party, his contribution claim is always governed by s 10(4), even where he is also liable to pay the third party under a court order. As Simon J rightly said (at [13]), this was not what Crane J held in *Knight*, and the argument 'assumes that s 10(4) takes precedence over s 10(3), whereas the opposite is the case'. Simon J also rejected the claimant's second argument, that time starts to run under s 10(3) from the date when damages are assessed rather than the date when liability is determined. He preferred the view that where there has been a split trial, time should start to run under s 10(3) from the date of judgment on liability. He reasoned (at [23]) that this is the stage at which 'a claimant in contribution proceedings knows that he will be liable', and added (at [24]) that:

'The extent of [the claimant's] liability [to the third party] may be uncertain and may not be known for years, but that is not a reason for postponing the issue of contribution proceedings ... [If these] come on for a hearing before the issue of damages, there is no reason why the court should not grant an indemnity or make an order that the defendant may bear a proportion of the damages which are to be assessed.'

[21.36] In principle, this reasoning seems sound. However, the claimant has successfully appealed from Simon J's finding on this second point, and the Court of Appeal has held that time starts to run under s 10(3) from the date when damages are assessed ([2006] EWCA Civ 4, [2006] All ER (D) 71 (Jan)). The court considered that the wording of the statute pointed towards this conclusion for two reasons. The first was that s 10(3) contains a postscript referring to subsequent judgments varying the amount of damages awarded against the claimant, which is consistent with the view that the earlier references to 'judgment' in the sub-section are references to a judgment in which damages have been assessed. The second was that this reading of s 10(3) renders it consistent with s 10(4), which provides that where the third party's action against the claimant is settled, the date when time starts to run is the earliest date when 'the amount to be paid ... is agreed'.

FINALITY OF JUDGMENT

[21.37] The Civil Liability (Contribution) Act 1978 s 1(5) provides that:

'A judgment given in any action brought in any part of the United Kingdom by or on behalf of the person who suffered the damage in question against any person from whom contribution is sought under this section shall be conclusive in the proceedings for contribution as to any issue determined by that judgment in favour of the person from whom the contribution is sought.'

Thus, where a claimant sues D1, who successfully defends the action, and then sues D2 in respect of the same loss, and recovers, the subsection prevents D2 from reopening the question of D1's liability to the claimant in contribution proceedings. The purpose of the subsection is to protect D1 from having to defend himself twice, even if evidence emerges in the second set of proceedings suggesting that he should have been found liable when the claimant sued him.

[21.38] In *Moy v Pettman Smith (a firm)* [2005] UKHL 7, [2005] 1 All ER 903 the question arose whether s 1(5) prevents D2 from reopening the question of D1's liability where the claimant has not sued them in a separate proceedings, but has sued them together as joint defendants to a single action, and has been awarded judgment against D2 but not against D1? The claimant is obviously entitled to appeal from the finding in favour of D1 in this situation, but what if he is satisfied with his judgment against D2, and has no interest in pursuing the matter any further? Can D2 appeal from the judgment in favour of D1, with a view to shifting some (or all) of the burden of paying the claimant onto D1? In the Court of Appeal, Latham LJ held that he can, reasoning that the underlying purpose of s 1(5) is not engaged in a case where all the relevant parties were present at the trial determining the facts, and took a full part in this trial ([2002] EWCA Civ 875, [2002] All ER (D) 126 (Jun) at [10]). On appeal, Lord Carswell agreed (at [67]–[69]) and was fortified in his view by the fact that Goddard LJ drew a similar conclusion with respect to claims under the Law Reform (Married Women and Tortfeasors) Act 1930, s 6, in *Hanson v Wearmouth Coal Co Ltd and Sunderland Gas Co* [1939] 3 All ER 47 at 55. It may be questioned, though, whether the fact that D1 and D2 have appeared in court together as defendants provides sufficient justification in itself for the rule laid down in *Moy*, given that the opposite rule continues to govern the situation where they have been sued in separate sets of proceedings. In both situations, D2 may have a legitimate complaint that his chance of recovering a contribution has been frustrated by the failure of the claimant to make out his claim against D1. If the interests of finality dictate that this complaint should be overridden in the one case, then why should it not be overridden in the other?

Wrongdoing

TORTS

[21.39] A long-running legal saga which raised issues of restitution for wrongdoing arose from the actions of the Iraqi Airways Company (IAC)

following the invasion of Kuwait by Iraq on 2 August 1990. From the date of the invasion until the start of the Gulf War in 1991, IAC removed aircraft and many spare parts (including engines) from the Kuwait International Airport and transported them to Baghdad. An action for recovery of the aircraft and/or damages (the Main Aircraft Action) was brought and appealed on various issues to the House of Lords (see *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19, [2002] 3 All ER 209). In the leading speech in the House of Lords, Lord Nicholls observed that, in relation to six of the planes which had been returned, a separate claim could have been brought by the Kuwait Airways Corporation (KAC), in addition to its compensatory claim, to recover the value of the benefit that IAC had obtained from the use of the aircraft. Lord Nicholls said (at [87]):

'Sometimes, when the goods or their equivalent are returned, the owner suffers no financial loss. But the wrongdoer may well have benefited from his temporary use of the owner's goods. It would not be right that he should be able to keep this benefit. The court may order him to pay damages assessed by reference to the value of the benefit he derived from his wrongdoing.'

[21.40] Lord Nicholls held that it was too late to advance such a claim for the first time in the House of Lords in the Main Aircraft Action. However, at the time when the Main Aircraft Action was commenced, a separate action had also been commenced for damages for the wrongful interference (the tort of conversion) by the IAC with spare parts belonging to the KAC: *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2004] EWHC 2603 (Comm), [2004] All ER (D) 215 (Nov) (the Spare Parts Action). This was adjourned to be heard after the Main Aircraft Action appeals had concluded, and by the time of hearing, liability was admitted so that the only question was quantification of damages.

[21.41] After the House of Lords' decision, an application was successfully made in the Spare Parts Action to amend the pleading to include a claim for 'user damages' for the use of the spare parts during the time which they were wrongfully detained by the IAC (at [467]). Cresswell J allowed the claim and made a substantial award which, following Lord Nicholls' obiter dictum, he also described as 'user damages'. Cresswell J rejected IAC's argument that because user damages were based on the gain to the IAC, they should be limited to the 'actual gain' by the IAC. His Lordship said (at [462]) that 'the defendant may only have derived limited benefit or may not have derived any actual benefit from the use of the goods, but under the user principle he will be ordered to pay a reasonable rent or hire or other reasonable sum'.

[21.42] Therefore, although the measure of reasonable rent or hire is explained as a measure of damages based on the defendant's gain, the remedy is not concerned with actual profit made by the defendant. Rather, the valuation is of the *use* obtained by the defendant as a result of its wrongdoing. On the other hand, Cresswell J described a remedy which

is valued by the profit made by the defendant as 'a true disgorgement remedy' (at [387]), and said that whilst an election between compensation and disgorgement was required, an election was not required between compensation and 'user damages'. An argument supporting and justifying the distinction and operation of these two measures is made in J Edelman *Gain-based Damages* (2002) where user damages are described as 'restitutionary damages' and the disgorgement award as 'disgorgement damages'.

Equitable wrongs

[21.43] A disgorgement claim to actual profits was raised in *Murad v Al-Saraj* [2005] EWCA Civ 959, [2005] All ER (D) 503 (Jul). The defendant and the two claimants agreed to buy a hotel. The defendant told the claimants that the asking price was £4.1m, of which £1m would be paid by the claimants, and £500,000 would be paid in cash by the defendant. The balance was to be raised by bank loan and a jointly owned company being set up for the purposes of the acquisition. The parties agreed to share the net revenue from the hotel as to one third for each person. If the hotel was sold, the capital profit would be shared equally between the defendant, on the one hand, and the claimants on the other. They later discovered that his contribution had been made by offsetting unenforceable obligations owed to him by the vendor. The real purchase price of the hotel was £3.6m, not £4.1m, although the vendor would not have sold without the offset obligations or £500,000 of additional value. The trial judge held that there was a fiduciary relationship between the parties, and that the defendant was in deliberate breach of his fiduciary duty by not disclosing that his contribution was by way of set off rather than a payment in cash. As a consequence of his breach of fiduciary duty, he was required to account for all the profit he made from the sale although he was allowed a deduction for his £500,000 non-cash contribution.

[21.44] On appeal, the defendant's primary argument relied on the finding by the trial judge that if he had disclosed to the claimants that his contribution was not in cash, they would have agreed to go ahead with the acquisition of the hotel but merely demanded a higher profit share. Accordingly, he argued that he should only have been held liable to repay the claimants' expectation loss (the higher profit share), and that to require him to disgorge all the profits was contrary to the principle that a breach of fiduciary duty must *cause* the profit which a fiduciary is required to disgorge. Arden and Jonathan Parker LJ, in the majority, rejected this argument and held that the defendant was liable to disgorge the whole profit, for two reasons. First, liability to account for, and disgorge, profits does not depend on any loss suffered (at [80]): Jonathan Parker LJ described the disgorgement award of an account of profits as 'neither compensatory nor restitutionary' (at [108]). Secondly, the courts will not investigate hypothetical situations as to what would have

happened if the fiduciary had performed his duty (at [76] and [111]–[112]). However, although the majority of the Court of Appeal therefore rejected a requirement of ‘but for’ causation, they still insisted on a causal link between the breach of fiduciary duty and the profit made by the defendant (that the profit was made by conduct within the scope of the fiduciary duty), the evidential onus being on the defaulting fiduciary to disprove this (at [77] and [85]). In dissent, Clarke LJ preferred a but-for test of causation although his Lordship said that it should be confined to a case with the facts of the kind in the instant appeal (at [160]–[161]). A Privy Council decision not cited to the Court of Appeal, but which adopted the same approach as that taken by the majority, is *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1.

[21.45] The decision is also notable for two further reasons. First, the whole court suggested that a future court might find it appropriate to relax that the rule that a trustee or fiduciary cannot make a profit from his fiduciary position; for example, where the beneficiary would not have objected to the trustee’s actions or would not have wanted the opportunity himself. This would effectively overturn, or at least confine the ambit of, the decision in *Keech v Sanford* (1726) Sel Cas Ch 61, [1558–1774] All ER Rep 230 (in which the opportunity was not available to the beneficiary). That decision has stood for 280 years. Secondly, in the leading judgment in the Court of Appeal, Arden LJ said (at [46]) that the trial judge’s finding that the defendant was liable to account for profits on the basis of his breach of fiduciary duty *or* deceit ([2004] All ER (D) 463 (May) at [347]) should be read as referring only to an action for breach of fiduciary duty and not as having taken the ‘novel step’ of recognising an account of profits for the common law tort of deceit. However, the trial judge plainly intended to take that step, and (at [345]–[347]) went out of his way to distinguish Court of Appeal authority which had held that an account of profits was not available for deceit: *Halifax Building Society v Thomas* [1995] 4 All ER 673. It is difficult to see why the trial judge’s alternative approach should be read down and why an honest fiduciary should be required to account for profits but a dishonest tortfeasor should not.

[21.46] Another case in which the issue of causation and disgorgement of profits arose was *Sandhu v Gill* [2005] EWCA Civ 1297, [2005] All ER (D) 36 (Nov). That case involved the unauthorised use of partnership assets to generate profit without the consent of the outgoing partner. Section 42(1) of the Partnership Act 1890 provides that after the departure of an outgoing partner, if there has been no final settlement of accounts:

‘the outgoing partner ... is entitled ... to such share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets.’

The question before the Court of Appeal was whether the words ‘share of the partnership assets’ referred to the partner’s share in the *gross* assets on

a notional dissolution or his share of the *net* assets. The outgoing partner argued for the former construction because his debt to the partnership exceeded any capital payment that would have been made to him. Hence he would have had no entitlement to profits on the latter approach. The Court of Appeal held that although each partner has a proprietary interest or share in all the assets of the partnership, the relevant words refer not to this proprietary interest but to the outgoing partner's entitlement to the net assets on a notional dissolution. In Black J's view (at [85]–[86]), the explanation for this rule is probably that the continuation of the partnership business, using assets in which the outgoing partner has a proprietary interest, is a breach of fiduciary duty, and the profits caused by (or 'attributable to') the breach are those that relate to the net financial interest of the outgoing partner.

[21.47] The issue of disgorgement for wrongdoing was also raised in an epic judgment of Lewison J, comprising 1,929 paragraphs, in *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [2005] All ER (D) 397 (Jul). This concerned equitable and intellectual property claims against the directors of two insolvent companies, amidst allegations of forgery, theft, false accounting, blackmail, and arson. In the course of his judgment, Lewison J considered the nature and operation of disgorgement remedies available against a defendant fiduciary as well as a defendant who dishonestly assists in a breach of fiduciary duty. His Lordship rejected an argument founded on *CMS Dolphin Ltd v Simonet* [2001] 2 BCLC 704, [2001] All ER (D) 294 (May), that where a fiduciary controls a company that knowingly receives funds transferred in breach of fiduciary duty, the fiduciary is accountable for these funds, simply by reason of his interest in the company. He declined to hold that the liability of dishonest assistants can only ever be compensatory, accepting (at [1594]) that they may also be liable to disgorge the profits of their wrongdoing. But he also declined to hold (at [1600]) that a dishonest assistant can be jointly and severally liable with the fiduciary whose breach of duty he has assisted, to pay over the amount of profits made by the fiduciary in which the dishonest assistant has not shared, and which have resulted in no corresponding loss to the principal. In so holding, his Lordship referred to S B Elliott and C Mitchell 'Remedies for Dishonest Assistance' (2004) 67 MLR 16, where it is observed that:

'Holding the dishonest assistant liable to account for profits made by a wrongdoing fiduciary may certainly serve as a powerful disincentive to deter third parties from meddling in the fiduciary relationship, but it is open to question whether it is needed in addition to the compensatory liabilities which dishonest assistants also owe. If not, then it begins to look like a punitive measure.'

Shipping Law

ROBERT P GRIME, BA, BCL

Emeritus Professor of Maritime Law, Southampton University

[22.1] The year 2005 saw a wide range of shipping cases reported in the Commercial Cases.

Limitation funds and jurisdiction

[22.2] Chapter III of the Convention for Limitation of Liability for Maritime Claims 1976 (arts 11–14) deals with the establishment of a limitation fund. Article 11 entitles ‘any person alleged to be liable’ to constitute a fund ‘with a court ... in any State Party in which legal proceedings are instituted in respect of claims subject to limitation’. That fund shall be ‘available only for the payment of claims in respect of which limitation of liability can be invoked’. By art 13, once such a fund has been established, other actions are barred and other security may be released. The establishing of a limitation fund is not, however, the only route to limitation of liability. Article 10, in the previous Chapter of the Convention, makes it clear that limitation may be invoked without the constitution of a fund, in the context of any proceedings for a limitable claim. The theoretical question is: what is the English court’s jurisdiction to entertain proceedings for the establishment of a fund? Is it wider than jurisdiction to entertain the relevant limitable claim? The practical question is, of course, how far it might be possible for a defendant to a maritime claim who may be likely to wish to claim limitation to take pre-emptive action in a state party to the Convention whose laws he might favour.

[22.3] In *The Denise (owners) v The Denise (Charterers)* [2004] EWHC 3305 (Admlty), [2005] 2 All ER (Comm) 47 David Steel J in the Admiralty Court had just such an issue. A tug, the Polago VI, and a dumb barge, the Denise, collided in the River Plate. They both belonged to Vessel SA. Cargo owners began proceedings in Argentina. Since it seemed likely that the cause of the casualty was an error in navigation by the master of the Polago VI, Vessel SA was likely to have a defence based upon the bills of lading. Other claims were likely against the shipping lines that had chartered the barge or booked space on the barge. CP Ships (UK) Ltd was one such shipping line. The shipping lines considered arresting Vessel’s ships to secure indemnity claims they might make against the shipowners. In response to that, Vessel’s P & I Club issued letters of undertaking. These letters were designed to secure English proceedings. At this point, Vessel commenced limitation proceedings in

the Admiralty Court. This would render the letters of undertaking redundant. CP Ships (UK) Ltd applied to set aside the proceedings. The essence of their case was that there was no jurisdiction because limitation proceedings would require the establishment of a limitation fund, and a limitation fund could not be established in the absence of proceedings ('underlying proceedings') in respect of a claim that might be limited. No underlying proceedings had been commenced within the jurisdiction.

[22.4] David Steel J, in an extempore judgment, dismissed the application. Section 20 of the Supreme Court Act 1981, the source of the Admiralty jurisdiction of the High Court, contained no such restriction. It includes 'any action by shipowners ... for the limitation of the amount of their liability in connection with a ship or other property'. Nor could the Convention be prayed in aid. Although art 11 clearly required underlying proceedings in the same state, limitation might be invoked under art 10 without the separate constitution of a fund. Furthermore, the Convention allocated questions of procedure with regard to limitation funds to the law of the state party (art 14). Under the Civil Procedure Rules (r 61.11(13)) the court might order a limitation fund to be established when a limitation decree is granted.

[22.5] In these conclusions, David Steel J derived support from the decision of Colman J in *ICL Shipping Ltd v Chin Tai Steel Enterprise Co Ltd, The ICL Vikraman* [2003] EWHC 2320 (Comm), [2004] 1 All ER (Comm) 246 that art 11 could be interpreted so as to allow the constitution of a limitation fund when arbitration proceedings, as against court proceedings, had been instituted. Clearly not a restrictive approach.

[22.6] A little over three months later another limitation case came to the Admiralty Court, *The Western Regent (Owners) v The Western Regent (Charterers)* [2005] EWHC 460 (Admlty), [2005] 2 All ER (Comm) 51. This time, the judge, Julian Flaux QC, sitting as a deputy judge of the High Court, did reserve judgment. The facts of this case were rather out of the ordinary. The Western Regent is a seismic survey vessel. In the performance of her function, she towed six 'streamers' 3,600 metres long and 100 metres apart. Two of them got entangled with the Elland Grant marker buoy, positioned above a well head in the Total Dunbar oilfield 70 miles east of the Shetland Islands. The buoy was dragged from its position and the well head damaged.

[22.7] The Western Regent was registered in the British Virgin Islands and owned by Seismic Shipping, a British Virgin Island Company. It was demised chartered to Westerngeco Ltd, who operated it. Westerngeco was English registered. The owner of the buoy and the well head was Total E&P UK plc, also English registered. It was accepted that the damage was caused by the negligence of Westerngeco and their servants and agents aboard the Western Regent. Seismic and Westerngeco commenced limitation proceedings, naming Total as defendants to those

proceedings. Total filed an original complaint in Galveston Texas against Seismic and Westerngeco, together with other corporations in the Westerngeco group, one of which (at least) was a Delaware corporation. In it Total claimed damages of \$US9.9m. If Texas law were to apply, limitation would be of no value to Seismic and Westerngeco. Total applied for a declaration in the English proceedings that the Admiralty Court had no jurisdiction.

[22.8] The issue was not dissimilar from that raised in *The Denise*. Total accepted that the court had personal jurisdiction over Westerngeco. It was an English corporation. It contended that there was no 'subject-matter jurisdiction', the illuminating phrase used by Hoffmann J in *MacKinnon v Donaldson Lufkin and Jenrette Securities Corp* [1986] 1 All ER 653. The only circumstance in which a shipowner (or demise charterer) can launch limitation proceedings is where underlying proceedings in respect of a claim that might be limited have been commenced in the jurisdiction. Essentially, the same point that had been raised before David Steel J in *The Denise*. Julian Flaux QC considered a range of authority and, in his reserved judgment, came to a similar conclusion. Total's application failed.

[22.9] First the Convention. To use the language of Griggs and Williams *Limitation of Liability for Maritime Claims* 'the owner of a vessel, anticipating arrest, can do nothing to force a claimant into a jurisdiction of his own choice' (p 50). At least, not by using art 11. A potential defendant to a maritime claim could not pre-empt his claimants by seeking to establish a limitation fund in an attractive state party before those claimants had commenced proceedings there. But art 10 expressly contemplated the commencement of limitation proceedings without the prior establishment of a limitation fund. Was there anything else that might import such a pre-condition? Total relied upon the judgment of Lord Phillips of Worth Matravers MR in *Schiffahrtsgesellschaft MS Merkur Sky MbH & Co KG v MS Leerort Nth Schiffahrts GmbH & Co KG, The Leerort and The Zim Piraeus* [2001] EWCA Civ 1055, [2001] All ER (D) 356 (Jun). In that case, Lord Phillips had considered the procedure for limitation claims under Ord 75 of the Rules of the Supreme Court, the predecessor of r 61.11 of the Civil Procedure Rules. His discussion assumed that a limitation fund would be established as a condition to limitation proceedings - and therefore that underlying proceedings would have been commenced within the jurisdiction. But he did not expressly advert to the point and, further, he distinguished between ordinary limitation decrees, good against all who might have a claim in respect of the circumstances in question, and 'restricted decrees' where the identity of the relevant claimants was known and stated. Clearly, the provisions of Ch III of the Limitation Convention 1976 were appropriate to the former circumstance but not to the latter. The present

case related to the claims of Total only and was a restricted decree. It was therefore possible for Julian Flaux QC both to distinguish and to not follow the dicta of Lord Phillips.

[22.10] Article 10, however, clinched the matter. Like David Steel J, the judge found there to be no restriction upon the application of that article. There was no precondition to proceedings for a limitation decree that a limitation fund should have been established. Which was enough to dispose of the case. The judge did not decide two further points advanced by counsel for the claimants: that it might be possible to establish a limitation fund under the Civil Procedure Rules rather than the Limitation Convention, and without the restrictions of art 11; and that Council Regulation (EC) 44/2001 (the successor to art 6A of the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters) might confer a similar jurisdiction. The latter had no application to the facts of the present case. Nor, maybe sadly, did he take up the suggestion made by the same counsel (relying on dicta of Rix J in *Caspian Basin Specialised Emergency Salvage Administration v Bouygues Offshore SA (No 4)* [1997] 2 Lloyd's Rep 507 at 535 and of Sir John Knox in the Court of Appeal in allied litigation, *Bouygues Offshore SA v Caspian Shipping Co (Nos 1, 3, 4 and 5)* [1998] 2 Lloyd's Rep 461 at 474) that there had always been a power in shipowners to make a pre-emptive strike by establishing limitation proceedings in a place other than that where the underlying litigation might start. We must wait another day.

Who is responsible for cargo?

[22.11] If there ever was a time when the law of carriage of goods by sea was simple and uncomplicated by complex contracts and internationally agreed rules, then the shipper was to bring the cargo to the ship, while the shipowners were to put it aboard. The shipmaster should look after the stowage, because that affected the trim and the seaworthiness of the ship, and carry the cargo safely to its destination. Responsibility was, therefore, distributed geographically. The passing of the ship's rail was a matter of high significance. In practice, of course, things cannot be so simple. Those whose job it is to get the cargo aboard ship – stevedores – have to be chosen, hired and paid. Someone, usually cargo interests, has to carry out those functions, with care. The operation of loading and discharging in practice involves co-operation between stevedores and the ship's officers and crew. Further complexity arises when a ship is time-chartered. While a voyage charter, whereby the vessel is loaded for a contracted destination at a rate determined by the amount of cargo loaded, can easily be seen as a species of contract of affreightment, similar to one evidenced by a bill of lading, a time charter is different. Here the charterer has a broader right to the ship's disposition, and might be expected to take a greater responsibility for the cargoes presented and for their

loading and discharge. Certainly time (and voyage) charterparties commonly provide for the allocation of responsibilities between owners and charterers.

[22.12] Bills of lading are usually governed by the Hague, Hague/Visby or Hamburg Rules. Article III, r 2 of the Hague and the Hague/Visby Rules places responsibility for the cargo firmly upon the carrier – subject to the exceptions and defences in art IV. ‘The carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried ...’ Rule 8 reinforces the obligation:

‘Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect ...’

The Hague and the Hague/Visby Rules apply to bills of lading, not to charterparties. And charterparties, particularly voyage charter parties, commonly adjust that allocation of responsibility.

[22.13] In *Jindal Iron and Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc, The Jordan II* [2004] UKHL 49, [2005] 1 All ER 175, [2005] 1 All ER (Comm) 1 (see also [8.1]–[8.5] above) the House of Lords addressed the question in its simplest form. The *Jordan II*, belonging to Islamic Solidarity was chartered to TCI Trans Commodities AG for a voyage from Mumbai to Barcelona and Motril in Spain. Jindal sold steel coils to Hiansa SA and they were shipped aboard *Jordan II* under two bills of lading in Congenbill form. The bills contained a Clause Paramount incorporating the Hague Visby Rules, which, in virtue of the law of India, applied to the shipment. The bills also incorporated the terms of the charterparty, in standard, general form: ‘All terms and conditions, liberties and exceptions of the Charterparty, dated as overleaf, are herewith incorporated ...’ Freight under the voyage charterparty was expressed per ton F.I.O.S.T. – Free In and Out Stowed and Trimmed. The charterers’ obligation was spelt out in cl 17: ‘Shippers/Charterers/Receivers to put the cargo on board, trim and discharge cargo free of expense to the vessel.’ Did the allocation of responsibility for loading to the shippers by the charterparty override art III, r 2 and survive the provisions of art III, r 8?

[22.14] More than 50 years ago, in the leading case of *Pyrene Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 All ER 158, Devlin J, that master of the common law, had observed, obiter, that:

‘The phrase “shall properly and carefully load” may mean that the carrier shall load and that he shall do it properly and carefully, or that he shall do whatever loading he does properly and carefully. The former interpretation, perhaps, fits the language more closely, but that latter may be more consistent with the object of the rules.’

His preference found favour in the House of Lords when, two years later, in *Renton (GH) and Co Ltd v Palmyra Trading Corp of Panama* [1956] 3 All ER 957, it decided that a contractual re-allocation of loading responsibilities from carrier to shipper is not invalidated by art III, r 8. *Renton* has been consistently followed and in the present case the Court of Appeal disposed of the issue by applying the decision. Before the House of Lords, the cargo owners argued that *Renton* was wrongly decided and should be overturned.

[22.15] For 30 years, the House of Lords has asserted its right to overrule its own previous decisions, but has exercised that right very sparingly. And it is particularly difficult to mount an argument for the use of the power in an area of law which impinges directly upon commercial practice. The only way to preserve the security of present and recent transactions would be by way of prospective overruling. Prospective overruling, if possible, is even more exceptional, and the current claimants would not benefit. Unsurprisingly, cargo-owners did not argue for that.

[22.16] Lord Steyn, who delivered the only substantial speech in the House, first considered the matter of interpretation. Which of the two possible meanings of art III, r 2 offered by Lord Devlin was the better? He himself had conceded that the interpretation he rejected fitted the language better. The cargo owners made two points. First, that the carrier's obligations in r 2 extended beyond the loading of the cargo. It covered its carriage. Although it might be envisaged that the shipper might undertake responsibility for the loading, for the *carriage* to be at the shipper's risk was clearly outside the purpose of the rules. Second, the French text, which is the authoritative text, contained the word 'procèdera', where the English text had 'shall'. The French word is a much stronger term than the English and denotes an undertaking.

[22.17] Lord Steyn was unconvinced. The Devlin interpretation, adopted in *Renton* was not linguistic but purposive. The Rules are a 'pragmatic compromise' between competing interests in an international context. While the seaworthiness obligation in art III, r 1 is personal to the carrier and cannot be transferred to the shipper, the obligations in r 2 are less important and, to some extent, may be. His lordship examined case law, the travaux préparatoires – as presented and discussed in Michael F Sturley's magisterial *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* – textbooks and decisions of courts in the US, Australia, New Zealand and India. He was able to reach 'no concluded view'. And in those circumstances was unable to depart from the decision in *Renton*.

[22.18] As so often is the case, Lord Mansfield said it first. In *Vallejo v Wheeler* (1774) 1 Cowp 143, [1558–1774] All ER Rep 411 he said:

'In all mercantile transactions the great object should be certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other.'

[22.19] Even when the rule is difficult to justify not only in terms of the language of the instrument but perhaps also in terms of its original, as against conventional, purpose.

[22.20] In *Mitsubishi Corp v Eastwind Transport Ltd* [2004] EWHC 2924 (Comm), [2005] 1 All ER (Comm) 328 Ian Glick QC, sitting as a deputy judge of the High Court, had to deal with a rather more direct attempt at exclusion, unencumbered by the Hague Rules. The case concerned 19 bills of lading relating to cargoes of frozen chicken shipped from Brazil to Japan. The chicken arrived damaged, allegedly as a result of failures in the refrigeration system. The bills contained an extensive carrier's exemption clause, specifically mentioning unseaworthiness, unfitness of the vessel and all faults and negligence. As a preliminary issue, the judge had to decide whether the clause was 'effective to exempt the defendants from any potential liability'. The matter was to be considered as an issue of the common law. No question of the application of the Hague or the Hague/Visby Rules was raised.

[22.21] The cargo owners argued that the effect of the clause was to exclude entirely the carriers' 'secondary obligations' under the contract of carriage. The language is, of course, that used by Lord Diplock in *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556, and, before that, Professor Brian Coote in his seminal book on *Exception Clauses*. A contractor's primary obligation is to perform the contract, his secondary obligation is to pay damages if he does not. The complete exclusion of secondary obligations nullified the contract, reducing it to a 'mere declaration of intent' – Lord Wilberforce in *Suisse Atlantique Société d'Armement Maritime SA v Rotterdamsche Kolen Centrale NV* [1966] 2 All ER 61. So we were back to *Glynn v Margetson & Co* [1893] AC 351, [1891–4] All ER Rep 693, a principle which appears to have survived the rise and fall of the doctrine of fundamental breach.

[22.22] The carriers could hardly argue for a narrower interpretation of the carriers' exemption clause. Nor could those classic authorities be evaded. Their position was that the court's power to limit the effect of exclusion clauses under *Glynn v Margetson* was very restricted. It was, they said, limited to cases where a wider interpretation would produce absurd, rather than unreasonable, results and defeat the clear contractual intentions of the parties. That proposition was accepted by Ian Glick QC. Examining the terms of the contract, he concluded that, in any case, the exemption clause did not relieve the carriers of 'liability for any and every breach of contract'. It did not, for example, cover loss or damage caused by their dishonesty of the carrier – though whether this was the result of the application of a rule of law (see Lord Hoffmann in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6, [2003] 1 All ER (Comm) 329) or the application of a principle of construction to the words before him 'did not matter'. And there might be further examples of events that fell outside the ambit of the exclusion

clause which it was not necessary to list. That did not render the meaning of the clause uncertain. The carriers might, therefore, rely upon it.

[22.23] Responsibility for loading and discharging as between carrier and cargo underlay the quite different issues raised in *Scheepvaartonderneming Flintermar v Sea Malta Co Ltd, The Flintermar* [2005] EWCA Civ 17, [2005] 1 All ER (Comm) 497. The Flintermar was time chartered by Sea Malta for use as a 'feeder service' in the Mediterranean to and from various ports in Italy and Malta. She was a modern multi-purpose vessel with adjustable bulkheads and decking, used in this charter to carry containers in connection with long-haul liner services.

[22.24] When the Flintermar reached a port, containers would be discharged and loaded. This could be a complex operation. Containers were carried under deck as well as on deck, and the Flintermar was fitted with removable pontoons to gain access to the holds. Containers would be discharged, temporarily or permanently, the pontoons taken out and later replaced. The vessel was equipped with a gantry crane, but there were physical limitations upon its use. Owners and charterers reached an 'accord' whereby shore cranes might be used, operated by the charterer's stevedores.

[22.25] On 16 September 1995, the Flintermar arrived at Gioia Tauro from Salerno, to discharge containers. These containers were stowed under deck as well as above deck. Stevedores' shore crane was used. The ship's chief officer was involved in the operation of replacing one of the pontoons. He was aboard the vessel and with him was a signalman, employed by the stevedores, who was in communication with the crane driver. Before the slings on the pontoon had been removed, while the chief officer was standing on the pontoon, the crane-driver unaccountably raised the pontoon. The pontoon, with the chief officer, fell into the hold. The 'overwhelming probability' was that the accident was caused by the negligence of the signalman or of the crane-driver.

[22.26] The owners made a settlement with the chief officer. The question before the court was whether they were entitled to be indemnified by the charterers. At first instance, Judge Hallgarten QC held that they were not. At the time of the accident, the stevedores were doing owners' work, not charterers' work. He separately found the method of operation, including the accord, to constitute an unsafe system of work, and thereby found the shipowners 20% contributorily negligent, while completely exonerating the first officer himself.

[22.27] The charterparty was *Baltimex 1939*, cl 4 of which required charterers to 'arrange and pay for loading, trimming, stowing, ... unloading, weighing, tallying ...' Clause 30 declared that charter hire included 'rendering customary assistance by the officers and crew' including, *inter alia* 'opening and closing of hatches' and 'removing

and/or replacing of beams'. Clause 31 required officers and crew to 'secure and/or unsecure, lash and/or unlash containers' etc. In the event of damage caused by the stevedores, cl 38 required the master to seek to obtain repairs and/or acknowledgment of responsibility from the stevedores, failing which, charterers were not to be responsible. Clause 48 entitled charterers to place an 'observer' aboard: any assistance given by such observer in loading or discharging was to be 'given to assist the master' and charterers were not to be responsible. Clause 48 contained the phrase 'the full and ultimate responsibility shall always remain with the master of the vessel' and ended: 'Loading, stowage, discharging to be made at Owners/Master's decision.' From this rather unclear set of provisions, it was necessary to discover whether the operations during which the chief officer was unfortunately injured was owners' or charterers' work.

[22.28] In the Court of Appeal, the owners argued that in this trade with this type of ship, hatch operations should be regarded as part of loading and unloading – charterers' work. Alternatively, that the 'accord' should be understood as an agreement that hatch handling should be incorporated into the loading and unloading operations carried out by the charterers' stevedores. They relied upon *SG Embiricos Ltd v Tradax Internacional SA, The Azuero* [1967] 1 Lloyd's Rep 464, in which Roskill J had held that port dues payable in respect of the opening and closing of hatches during an unloading operation were at charterers' account, although the initial opening and final closing were properly at owners' account. Charterers argued that hatch work is, at common law, an owner's responsibility and that this was reinforced by cl 30 of the charterparty; that the accord did not affect responsibility; that cl 48 clearly placed responsibility on the owners and, being a special added clause, must take precedence over the printed clauses; and that the finding at first instance that the owners were 20% responsible for the accident invalidated their claim for an indemnity.

[22.29] Rix LJ, who gave the only substantial judgment in the Court of Appeal, first considered how the terms of charters had adjusted the simple geographical division of responsibility at the ship's rail with which the common law began. Charterers might be responsible for providing stevedores and, if so, would be liable for their actions even aboard the ship. The requirement that those stevedores work 'under the supervision of' the master did not affect that legal liability, as the House of Lords held in *Canadian Transport Co Ltd v Court Line Ltd* [1940] 3 All ER 112, but 'under the supervision and responsibility of the master' shifted the liability back to the shipowners (*Marintrans AB v Comet Shipping Co Ltd, The Shinjitsu Maru (No 5)* [1985] 3 All ER 442). But what of the relation between operations connected with the vessel's hatches and the loading or discharging of cargo? *The Azuero* seemed to be the only case specifically on hatch handling, as against cargo stowage. Turning to the charterparty before him, his Lordship concluded first that the responsibility for hatch

handling lay primarily on the owners. Hatches were part of the ship's equipment. This followed from general principles. Clause 30, therefore, was strictly unnecessary to the case, but it supported that conclusion. Further, primary responsibility for cargo operations was clearly placed upon charterers by cll 4 and 13.

[22.30] The central question was whether cl 48 shifted liability back to the owners, through the shipmaster. This was not susceptible of a simple answer. The clause concerned an observer placed aboard by charterers. Consequently, it envisaged a split in responsibilities. It was for the charterers, through their observer, to advise as to loading or discharging and for the owners, through the master, to decide. But that was only the beginning. Rix LJ agreed with a further distinction, adopted by Judge Hallgarten QC, between decision and execution. It was for the master to decide on the method to be adopted (with the observer's advice) and for the charterers, through their stevedores, to execute that method – without negligence. Thus, if the replacement of the pontoon was to be considered, on the facts, as part of the cargo operations, and if the accident occurred through negligent execution of the adopted method of operation, rather than a negligently adopted method, then the charterers were responsible. Otherwise, the owners were responsible and thus unable to recover an indemnity.

[22.31] What, then of the facts? *The Azuero*, which concerned with allocation of costs, not liability, could be prayed in aid to support the proposition that hatch removal and replacement at the beginning and end of loading or discharging remained an owner's responsibility, while shifting of hatches during the course of loading and discharging remained with the charterers. But the events at Gioia Tauro were not as simple as that. It was not a question of when the pontoon was moved, but how it was done. If the opinion of Rix LJ, had the gantry crane (part of the ship's equipment) been used, then the moving of the pontoon would have remained hatch handling and for the owners, whenever it occurred. The chosen method, under the accord, of using a shore-crane, operated by the stevedores, was, on the facts, an integral part of the overall cargo operation. Indeed, the charterers had in part accepted this because they had paid for the damage caused to the ship by the fall of the pontoon. Thus the owners succeeded.

Demurrage and strikes

[22.32] Charterparties commonly contain exceptions in respect of demurrage covering strikes and other events that are not within the control of charterers. Clause 9 of the Americanised Welsh Coal Charter Form (amended 1979) is one such clause, in what might be regarded as standard terms:

'In case of strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the consignee which prevent or delay the discharging, such time is not to count unless the vessel is already on demurrage ...'

[22.33] What is the significance of the phrase 'beyond the control of the consignee'? Did it apply to the enumerated examples in the first part of the clause, or should it be read as one with 'any other causes or accidents'? To put it another way, was it enough for the consignee/charterer to demonstrate that there was a strike which prevented discharge to avoid paying demurrage, or was it necessary to show that the strike was in some sense beyond his control?

[22.34] In *Frontier International Shipping Corp v Swissmarine Corpn Inc* [2005] EWHC 8 (Comm), [2005] 1 All ER (Comm) 528 Nigel Teare QC, sitting as a deputy judge of the High Court, was presented with this point of interpretation. The Cape Equinox was chartered by Swissmarine to Frontier International Shipping for a voyage from Dalrymple Bay in Australia to Lazaro Cardenas in Mexico on Americanised Welsh Coal Charter Form, mentioned above. The consignees were Sicartsa. The Cape Equinox arrived at Lazaro Cardenas on 12 December 2001 and commenced discharging her cargo of coal the next day. On 17 December, the employees of Sicartsa went on strike. The strike lasted until 16 January 2002. Discharge was completed on 17 January 2002. The owners claimed demurrage and the arbitrators upheld their claim. They found that although the charterers could not have avoided the strike, it was not outside their control within the meaning of the clause in the charterparty.

[22.35] The charterers argued that the point had been decided more than 70 years ago by Wright J in *Stathatos Steamship Co Ltd v Cordoba Central Railway Co Ltd* (1931) 40 Lloyd's Rep 274. In that case, the owners argued that the consignees could have 'found free labour', that is, broken the strike, and discharged the ship. Charterers argued that they had hired free labour when they could and that the clause only required action that was reasonably possible. Wright J found no point of law at issue: the question was the factual one of whether the charterers had done what they might to get the ship discharged. Which might be thought to be a simple matter of causation: was the delay caused by the strike or by the charterers' failure to obviate the effects of the strike? If that were the law, then to avoid paying demurrage under the clause the charterers could either prove that a strike or another of the circumstances enumerated in the first part of the clause existed and that such event was causative of the delay, or they could prove the existence of some other circumstance with similar causative effect, provided this other circumstance was 'beyond the control of the consignee'.

[22.36] The owners argued for the alternative interpretation, that all circumstances, enumerated or described generally, had to be 'beyond the

control of the consignee'. That approach could be supported by reference to the judgment of Kerr J in *Mareva Navigation Co Ltd v Canaria Armadora SA, The Mareva A/S* [1977] 1 Lloyd's Rep 368 and of Aikens J in *Mamidoil-Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* [2002] EWHC 2210 (Comm), [2002] All ER (D) 243 (Nov). The deputy judge upheld the arbitrators' finding, preferring the owners' argument. He did not, however, rely upon *The Mareva* or *Mamidoil-Jetoil Greek Petroleum*. They both concerned similar types of phraseology, the first in the off-hire clause in the New York Produce Exchange time charterparty, the second in a *force majeure* clause in a crude-oil trading contract. The judge pointed out that they concerned different contracts in different contexts. He began with a simple proposition: 'there is sense in interrupting the running of laytime where a strike is beyond the control of the consignee but it is difficult to identify any reason for interrupting laytime where a strike is not beyond the control of the consignee.' Common commercial sense quite properly considered as the presumed intention of the parties. He considered a number of points of difficulty with this interpretation and was not moved by any of them. As for the dicta of Wright J in *Stathatos Steamship*, the precise point raised in the instant case had not been argued before him and he approached the question as one of causation – did the strike in fact cause the delay in discharging. This was a question of fact – as he said, there was no question of law to be decided – which involved considering whether the availability of free labour meant that the charterers could have discharged notwithstanding the strike. Nigel Teare QC saw the causation requirement as separate from and additional to the requirement that the events be beyond the control of the consignee in this case. The appeal, therefore, was dismissed.

Repudiation of charterparties

[22.37] The Bow Cedar was chartered by her disponent owners, Odfjell Seachem to Continentale to carry a cargo of jet fuel, gasoline and gas oil from Bahrain to Benin on BPVOY4. Laycan dates were 27–29 August 2002. Notice of readiness was tendered on 27 August and laytime commenced. It expired on 30 August. On 2 September, the charterers, having failed to find a cargo, sent the owners an email cancelling the charterparty. This repudiation was accepted by the owners the following day: they claimed a 'cancelling fee' of the lost freight less port costs. Two days later, the Bow Cedar was chartered for a voyage from Karachi to Europe. Correspondence then ensued between the charterers' solicitors and the owner's defence club which lasted for over a year. A claim form was issued on 31 October 2003, and service was effected in Benin in April 2004. The owners applied for summary judgment in August 2004 on the grounds that the charterers had no real prospect of successfully defending the claim. By this time, the claim had been reduced by nearly one third

and stood at US\$474,802.31 plus interest. The charterers sought to defend the claim on the time-bar in the charterparty and also raised points on the quantum of damages.

[22.38] The case came before Nigel Teare QC, deputy judge of the High Court (*Odfjell Seachem A/S v Continentale des Petroles et d'Investissements* [2004] EWHC 2929 (Comm), [2005] 1 All ER (Comm) 421). The time-bar was contained in cl 20 of the charterparty. This provided for two periods: 90 days for 'demurrage, deviation or detention' and 180 days for 'any other claim against charterers for any and all other amounts which are alleged to be for charterer's account under this charter'. In each case, time began to run from 'the completion of discharge of cargo'. Charterers argued that where no cargo was loaded, time should run from the date on which the cargo *should* have been delivered, which, they alleged, owners had not done. The owners' position was that cl 20 did not apply, that the charterers were estopped and that, in any event, cl 20 had been complied with.

[22.39] The judge found for the owners on two of the three points. The language of the 180-day time-bar section of cl 20 was not apt to cover claims for damages for repudiation of the charter, but rather claims for sums allocated to charterers' account under the charterparty. There was no real prospect of implying a term into cl 20 to allow for time to run from when the cargo should have been delivered should no cargo have been loaded. Had the parties intended such, they would have included it: probably by using the pattern adopted in art III, r 6 of the Hague/Visby Rules. Not was *The Moorcock* (1889) 14 PD 64, [1886–90] All ER Rep 530 any help. Business efficacy did not clearly require such a term. Further, it seemed likely that the owners would be able to establish compliance within the 180-day period. However, the judge concluded that the owners had no real prospect of establishing an estoppel – there was no clear representation and no material reliance. But two out of three is enough.

[22.40] On quantum, there were three issues. The most important related to demurrage. About one quarter of the owners' claim was described as demurrage. It included not only demurrage actually incurred before the charterparty was repudiated but also demurrage that would have been incurred had the charterers loaded and discharged cargo under the charter. Charterers argued that damages were to be assessed on the basis of that which would have been earned by the owners had the contract been fully and properly performed. In such circumstances, loading and discharging would have been carried out during laytime and no demurrage would have been incurred. The owners argued that demurrage was simply part of their earnings under the charterparty.

[22.41] Charterers relied on *SIB International Srl v Metallgesellschaft Corpn, The Noel Bay* [1989] 1 Lloyd's Rep 361, decided by the Court of Appeal. In that case the *Noel Bay* was chartered for a voyage from a nominated port in Italy. The charterers were to nominate the load port

before the ship left her last port of call. The *Noel Bay* finished her previous employment in Malta on 29 May, the charterers failed to nominate and the charterparty was repudiated on 3 June. Owners claimed damages including loss of profit for the period 29 May to 3 June. The Court of Appeal held that they were not entitled to that. Two members of the court agreed with the trial judge that the proper measure of damages was the loss of the repudiated charter, valued as if it had been properly performed. They also found that damages for non-nomination had not been pleaded. Staughton LJ, however, thought that such damages were recoverable, but that in this case they had been extinguished by the credit given for profits earned on the substitute voyage.

[22.42] Nigel Teare QC looked first at principle. Demurrage was liquidated damages for charterer's breach of contract in delaying the vessel beyond the laydays. An accepted repudiation terminates a contract as from the time of acceptance, leaving intact rights that may have accrued before such acceptance. On that basis, the owners' claim for demurrage incurred before 3 September 2002 was good. Turning to *The Noel Bay*, he pointed out that the majority had accepted that a claim for damages that had accrued before repudiation might properly be claimed in addition to general damages for repudiation and that, for one of the majority at least, the trial judge was correct to disregard the claim for damages for non-nomination because it had not been pleaded before him. Finally, in that case, the failure to nominate had not caused a separate loss. The judge therefore distinguished the case and decided the issue on principle. Demurrage incurred before repudiation was claimable.

[22.43] Two further minor points on quantification were dealt with and the judge concluded that the charterers had no real prospect of defending the claim. The application for summary judgment was granted.

Specific performance of charterparties?

[22.44] Can a time charterparty be specifically enforced? General principles of the law of contract would say no. Specific performance is available only in respect of contracts for the conveyance of land and perhaps contracts relating to peculiar or even unique chattels. It is certainly not available for contracts requiring services to be rendered, if only because the court cannot police such an order. But there is some very odd and elderly authority which does not quite fit, notably *De Mattos v Gibson* (1858) 4 De G & J 276.

[22.45] Cool Carriers, later LauritzenCool, is one of the three largest operators of refrigerated ('reefer') ships worldwide. Its large fleet, as is usual with large fleets, includes vessels that are 'chartered in'. In earlier times, such chartering in would probably have been effected by demise or bareboat charters, whereby the charterer undertakes full responsibility for the vessel, hires the crew, 'paints the funnel' and is treated as 'disponent owner'. Such was not the practice with LauritzenCool. They used time

charters, generally for long periods. The owners of such vessels place them in a 'pool' managed by LauritzenCool and are paid in accordance with a formula driven by the total revenue of the fleet. The terms of the charterparties (Cooltime 95) included a provision, cl 50, under which, in the event of a withdrawal of a vessel by the owners, the LauritzenCool were entitled either to be paid by the owners 50% of the market time-charter hire for the balance of the charter period, or the difference between the sums payable to the owners under the charter and the cost of a replacement vessel. It was not intended that vessels should be lightly withdrawn.

[22.46] Mediteranska Plovidba (Medplov) was a Croatian corporation which had participated in Cool Carriers pool since 1986. In 1997 it had two vessels under construction at Split, Lady Racisce and Lady Korcula, which were destined for the pool. But Medplov was in financial difficulties. They turned to Cool Carriers for help. Cool Carriers took a minority interest in the Liberian corporation which was to own the vessels and loan finance was arranged which was partly secured on the Cooltime charters of the vessels. The vessels were completed and delivered to the pool in 2000. In 2003 the ships were disposed of by the sale of the Liberian corporation and the loan was paid off. The new owners were unhappy with the management of the pool. This led to an arbitration on the matter of the duties of LauritzenCool. The arbitration award was published in October 2004. The two vessels were chartered to the pool until 2010, but the owners indicated that they wished to withdraw them. In this connection, the owners raised the issue of the legality of the pool. Their position was that, unless they could reach agreement for the withdrawal of the ships without penalty on 15 December 2004, they were minded to raise with the European Commission the complaint that the pool was an illegal capacity cartel under European Community law. LauritzenCool maintained that the charters were entirely lawful and they commenced arbitration proceedings on all these matters. They sought undertakings from the owners that the vessels would not be withdrawn pending final determination of these arbitration proceedings. The undertaking was not forthcoming. LauritzenCool commenced court proceedings for an interim injunction to restrain withdrawal.

[22.47] The matter came before Cooke J in the Commercial Court (*LauritzenCool AB v Lady Navigation Inc* [2004] EWHC 2607 (Comm), [2005] 1 All ER (Comm) 77). A basic question of the law of contract was raised (see also [8.40] above). The shipowners claimed that the charterparties were contracts for services which could not be specifically enforced. The interim injunction could, in practice, have that effect. It is, as Cooke J said, 'trite law that specific performance of a charterparty is not an available remedy'. LauritzenCool did not, of course, ask for that. It sought three possible variants restraining the owners from: (1) taking 'any step preventing performance of the time charters'; (2) employing the

vessels 'in a manner inconsistent with the time charters'; or (3) fixing the vessels on any other charter before March 2010 (the date of expiry of the current charters).

[22.48] The owners argued that all variants fell foul of the principle. They relied upon a dictum of Lord Diplock in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 All ER 763 that to grant an injunction restraining a shipowner from exercising a right of withdrawal from a charterparty 'though negative in form, is pregnant with an affirmative order to the shipowner to perform the contract; juristically it is indistinguishable from a degree for specific performance ...' But there is a fair amount of old and very well-known authority to the contrary. Lord Chelmsford LC had allowed an injunction restraining the employment of a chartered ship otherwise than in performance of the charter in *De Mattos v Gibson*. He thought that a ship might be considered to be 'a chattel of peculiar value' which would justify a court of equity in restraining its employment in a different manner. He was thus able to distinguish the then recent leading case of *Lumley v Wagner* (1852) 1 De GM & G 604, [1843–60] All ER Rep 368. The Privy Council relied upon *De Mattos v Gibson* in *Lord Strathcona Steamship Co Ltd v Dominion Coal Co Ltd* [1926] AC 108, [1925] All ER Rep 87. And there is Court of Appeal authority to the same effect. How then must *The Scaptrade* be understood? Cooke J pointed out that the case was concerned with whether a shipowner might be restrained from exercising his contractual right, justifiably, to withdraw his vessel. This was different 'in form and substance' from an order which restrains the owner from employing his ship outside the charter. On that basis, the second and third formulations of the proposed interim injunction did not fall foul of *The Scaptrade*. The first might.

[22.49] But the owners had another arrow in their quiver. These were most peculiar time charterparties. They were, in effect, ship management contracts as well and the 'duties arbitration' had concluded that they involved mutual duties of trust and co-operation. This, it was argued, took the case right back to *Lumley v Wagner* (the music-hall performer case) or, in more modern times, to *Warren v Mendy* [1989] 3 All ER 103, which concerned a boxer's management contract. To the contrary, the charterers found an unreported case, *Re Regent International Hotels (UK) Ltd v Pageguide Ltd* (1985) Times, 13 May, CA Transcript 164, which related to the management of the Dorchester Hotel. On close examination of the facts and the award in the duties arbitration, however, Cooke J could not find evidence of any personal responsibilities such as existed in the cases cited by the owners. This led the judge straight to *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, the *locus classicus* for the principles governing the issue of interim injunctions – the balance of convenience as developed and refined. After carefully

examining the complexities of the reefer trade and the position of the parties, the judge granted the injunction in the second and third form described earlier.

Towage and contributory negligence

[22.50] Older books on maritime law would contain two memorable, and very often misleading, statements about towage: 'Tug and tow are one ship' and 'The tug is the servant of the tow'. The authority generally used is *The Niobe* (1888) 13 PD 55. There, the *Niobe* was being towed by the *Flying Serpent*. Owing to inadequate look-out aboard the *Flying Serpent*, both vessels collided with the *Valetta*. The owners of the *Niobe* were held liable, since control of the navigation had to be placed somewhere and the tow was a fully manned ship under ordinary navigational control. The President of the Probate, Divorce and Admiralty Division commented, in terms which may have been more acceptable in the nineteenth century than they are today: 'the officers of the tow are usually, as in the present case, of higher class and better able to direct navigation than those of the tug.' What precisely might have been done by the master and crew of the *Niobe*, in those days before radio communication, was not completely clear, although it was suggested they might have 'girted' the tug, by throwing their vessel into a sheer and thus inhibiting forward motion. Of course, the principle, if it exists, cannot easily apply where a tug tows dumb barges, or some other burden which is not a ship under command. And it is much affected by the contractual terms used in towage.

[22.51] In *Maridive VII v Key Singapore, The Key Singapore* [2004] EWHC 2227 (Comm), [2005] 1 All ER (Comm) 99, a jack-up rig, the *Key Singapore*, was being moved in the Eastern Mediterranean by three tugs. The flotilla ran into a massive storm which lasted for ten days and in which wind speeds reached the upper limit of Force 10. The rig suffered damage and much praiseworthy effort was put into recovering and saving her. Salvage claims were made. The owners of the rig raised the question of the negligence of the tugs in respect of which the salvage claims were made. The matter of salvor's negligence has a somewhat odd history. Before the decision of the House of Lords in *The Tojo Maru, Owners of motor tanker Tojo Maru (her cargo and freight) v N V Bureau Wijsmuller* [1971] 1 All ER 1110, it was possible to argue that a successful salvor was not liable for negligence, although negligence might be a ground for reducing the salvage award. Even after the House rejected that almost unique immunity, the courts sometimes showed themselves ready to forgive a negligent salvor (see *The St Blane* [1974] 1 Lloyd's Rep 557). But the last 30 years' development of Lloyd's Open Form (LOF – the standard salvage agreement 'no cure, no pay') and, above all, the Salvage Convention 1989, have significantly altered the legal duties and obligations of salvors.

[22.52] This was a case of tugs under a towage contract 'going on salvage', that is to say, being faced with risks and dangers which can

properly be considered to be quite outside their responsibilities under their towage contracts, thus being able to disregard their contractual obligations and claim for salvage as if a volunteer. The arbitrator found, and this finding was accepted by all parties, that the need for salvage services, or their degree of difficulty, had arisen through the fault of both parties. So the owners of the rig based themselves firmly on art 18 of the Convention, which states: 'A salvor may be deprived of the whole or part of the payment ... to the extent that the salvage operations have become necessary or more difficult because of fault or neglect on his part.' This, it was accepted, required the court to assess the relative contribution of the parties' faults. So how, in the twenty-first century, should the fault of a tug be adjudged? One, perhaps the most important, fault was the failure to ensure that the flotilla heaved to in time. A matter of the general navigation of the flotilla. The original arbitrator placed the greater responsibility in this matter upon those aboard the rig – they were in charge of the navigation. Which fits *The Niobe*. The appeal arbitrator thought differently: 'I do not consider that in terms of causative potency there is any difference between the rig's failure to order the tugs to heave to and the tug's failure to advise the rig mover that the tugs should heave to.' He held them equally to blame.

[22.53] This, therefore, raised the venerable issue of whether the tug is the servant of the tow. David Steel J went through the authority – eight leading cases beginning with *The Duke of Manchester* (1846) 2 Wm Rob 470 and finishing with *The Niobe*. He pointed out that none was concerned with comparative fault, but with the older rule under which contributory fault was a complete bar to liability. He found nothing in the authorities to support the contention that 'the overall command of a towage convoy imports with it an enhanced degree of fault in cases where both tug and tow have fallen short of their mutual duty to take care'. Surely correct.

Sue and labour

[22.54] The Marine Insurance Act 1906, s 78 states that where a marine insurance policy contains a suing and labouring clause (and they all do), 'the engagement thereby entered into is deemed to be supplementary to the contract of insurance, and the insured may recover from the insurer any expenses properly incurred pursuant to the clause, notwithstanding that the insurer may have paid for a total loss ...' Suing and labouring expenses, the costs of 'such measures as may be reasonable for the purpose of averting or minimising' a recoverable loss under the policy, are thus a separate undertaking and recoverable even where the general cover is exhausted by total loss or by other limits.

[22.55] *North Star Shipping v Sphere Drake Insurance plc* [2004] EWHC 2457 (Comm), [2005] 1 All ER (Comm) 112 raised a procedural question arising from this separateness. In 1994, the *North Star* was seriously

damaged by a bomb, allegedly placed by terrorists, while berthed in a repair dock. The owners claimed for a constructive total loss under their war risks policy. The war risks underwriters rejected the claim. She was sold for scrap and towed to Turkey. The owners issued a writ claiming US\$4m by way of constructive total loss and including some US\$59,000 as suing and labouring expenses incurred in making the vessel fit for its tow to Turkey. The suing and labouring claim was not particularised: there was no pleading as to the factual basis for the claim.

[22.56] Colman J held the suing and labouring claim was insufficiently pleaded and should fail. The claim was not ancillary to the claim for a constructive total loss, but a separate claim which had to be separately pleaded.

Straight bills of lading and the Hague/Visby Rules

[22.57] In *J I MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2005] UKHL 11, [2005] 2 All ER 86, [2005] 1 All ER (Comm) 393, the House of Lords affirmed the decision of the Court of Appeal ([2003] EWCA Civ 556, [2003] 3 All ER 369, [2003] 2 All ER (Comm) 219) that a straight bill of lading was a bill of lading within the Hague/Visby Rules and not a mere sea waybill or receipt. Substantial speeches were delivered by Lord Bingham, Lord Steyn and Lord Rodger. They all agreed with the detailed judgment of Rix LJ in the Court of Appeal. The issue was simple. A US corporation bought printing machinery from an English company. The goods were consigned from Durban to Felixstowe under a document which declared itself to be a bill of lading. The purchaser was named as consignee and the document did not contain the magic words 'or order'. Its printed terms declared it to be non-negotiable without those words. Could the consignee take advantage of the package limitation provisions of the Hague/Visby Rules, in virtue of the UK Carriage of Goods by Sea Act 1971, or was he limited to the much lower limits contained in the US Carriage Of Goods by Sea Act 1936. If Hague/Visby applied, they were mandatory in virtue of the UK Act. They applied if the document was 'a bill of lading or any similar document of title' within art 1(b) of the rules.

[22.58] This was a straight bill of lading. It was not negotiable. Straight bills were known before the Hague Rules were adopted and in the US were regulated by the Pomarene Act of 1916. They are well known in Europe, but relatively uncommon in the UK.

[22.59] They are documents of title, in that they provide a mechanism – the only mechanism, when they are used – whereby the consignee can obtain delivery of the cargo. They are evidence of the terms of the contract of carriage. They are also a receipt for the goods. It is clear what they are. The question is the narrow one of whether they come within the definition. The view expressed by the House was that they do. There was

nothing in the *travaux préparatoires* of the conference to lead to a narrow construction and, as Lord Steyn pointed out, the phrase is of its nature expansive.

Solicitors

FRANCES J SILVERMAN, LL.M.

Solicitor

The solicitor/client relationship

[23.1] The relationship between solicitor and client is a fiduciary one from which a presumption of undue influence can arise. In *Hudson v Cobbetts* [2005] All ER (D) 258 (Mar) the High Court was asked to decide whether a district judge's decision in holding that there had been no undue influence between a solicitor and his client was correct.

[23.2] The claimant in the case was a guarantor in respect of legal fees payable to the defendant firm in connection with advice given by the firm to a property company owned by the claimant's son. When the defendants issued a statutory demand to recover their fees, the claimant maintained that there was a presumption that the guarantee he had given had been obtained by undue influence and that the defendant should have insisted that the claimant took independent legal advice.

[23.3] The district judge had dismissed the claimant's claim and the matter came before the Chancery Division on appeal. The court held that some disadvantage was required in order to establish undue influence and that on the facts of the case the provision of the guarantee did not amount to an advantage being taken of the claimant. The defendant firm had advised the claimant to seek independent advice. Since he was an experienced businessman who understood the nature of a guarantee, there was no obligation on the firm to insist that independent advice was obtained. Both grounds of the appeal therefore failed and the decision of the district judge was upheld.

[23.4] Even where an exception to r 6 of the Solicitors Practice Rules 1990 exists, acting for both parties in the same conveyancing transaction is generally inadvisable because of the dangers of conflict of interest. This latter principle is well demonstrated by the case of *Hilton v Barker Booth and Eastwood (a firm)* [2005] UKHL 8, [2005] 1 All ER 651, where the House of Lords held the defendant firm liable to the claimant in damages for breach of contract in a situation where the defendant had continued to act for both parties in the face of a patent conflict of interests (see also [8.20], [16.46] above).

[23.5] The defendant firm had in the past acted for a client (B) in a criminal matter which had resulted in B serving a prison sentence. On his release, B persuaded the claimant to enter a property development deal with him and the defendant acted for both sides in this transaction. The

defendant obviously knew of B's background, which included offences involving fraud and participating in the management of a company while an undischarged bankrupt. Because of their duty of confidentiality to B, the defendant felt unable to disclose details of B's background to the claimant and this created an irreconcilable conflict of interests despite which, the defendant continued to act for both parties. Needless to say, the property deal went disastrously wrong and the claimant sued the defendant for breach of contract. At first instance the judge had held that the defendant's breach of duty lay in continuing to act, therefore the claimant was entitled to be placed in the position he would have been in had he instructed an independent solicitor. Since an independent solicitor would not have known of B's background, the claimant would not have been in any better position than he was with the non-disclosure by the defendant, thus the loss was nil and the claim was dismissed. The Court of Appeal ([2002] EWCA Civ 7213, [2002] All ER (D) 344 (May)) upheld the first instance decision on slightly different grounds, holding that there had been an implied term in the retainer between the claimant and defendant excusing the defendant from disclosing to the claimant information which they were legally obliged to someone else to treat as confidential. The House of Lords took a different view, saying (at [38]) that:

'The notion that one breach of duty by [the firm] (failure to tell [the developer] that they could not act for him and that he should seek independent advice) should exonerate [the firm] in respect of a subsequent and more serious breach of duty (failure to disclose to [the developer] facts which would have saved him from ruin) seems contrary to common sense and justice.'

Accordingly, they held that the firm had no answer to the claimant's claim for damages and the appeal was allowed.

[23.6] A further example of the principles of conflict of interests and confidentiality arose in *R v Pearson* [2005] EWCA Crim 1412, [2005] All ER (D) 462 (May), where a solicitor was threatened by his client (who was in custody pending investigation of a serious criminal charge) and was asked by the client to commit a criminal offence. The solicitor reported this to the police and continued to act for the client. The disclosure of the information to the police is technically a breach of the duty of confidentiality to the client, but comes within one of the exceptions to that principle (the commission of a future serious criminal act) and thus is justifiable. The disclosure of this information to the police, who acted on it and recovered money from the defendant's home, did, however, create a conflict of interest between the solicitor and his client and the defendant argued that the fact that the solicitor had continued to act in these circumstances had disabled him from providing independent advice to the client and had thus prejudiced the trial. It was held that, as the client had asked the solicitor to commit a criminal offence, the client could have no complaint whatsoever that this

information had been passed on to the police. The client had had a fair trial, the solicitor's disclosure had had no adverse consequences on the client and his application to appeal was refused.

Financial services

[23.7] *Financial Services Authority v Martin* [2004] EWHC 3255 (Ch), [2005] 1 BCLC 495, [2005] All ER (D) 239 (Feb) concerned a small London firm of solicitors who were prosecuted by the Financial Services Authority for being in contravention of the Financial Services Act 1986. The defendant firm was not authorised to carry out investment business under the Financial Services Act but had agreed with a client to provide the administration of the client's investment scheme. This involved potential investors depositing money in the defendant firm's client account and the firm would arrange investments, deal with share certificates etc on the client's behalf. The scheme was not sound, its advertising was misleading, investors lost money, and at one point the defendant firm's client account was substantially in deficit.

[23.8] The claimant sought an order for summary judgment against the defendant on the basis that they had no arguable defence to the claim that they were knowingly concerned in contravention of the Financial Services Act and for an order that the defendant repay money to investors who had suffered loss.

[23.9] To make such an order the court had to be satisfied that the defendant's client had contravened the Act. This was found to be the case as the client's business was not regulated either in the UK or in Spain, where he was based. Secondly, it was necessary to show that the defendant was knowingly concerned in the contravention. A large part of the argument before the court centred around the interpretation of the word 'concerned', for which there had previously been no statutory or case law guidance. In this context 'concerned', seems to mean 'involved in'. The defendant firm was involved in the client's scheme in ways that were fundamental to the scheme: they participated in the sourcing and arranging of the purchase of shares as well as acting as a bank account for the investor's money. Without this involvement the scheme could not have operated. There was therefore little doubt that the defendant was concerned in the Financial Services Act contravention and an order was made against the defendant to that effect together with an order to repay the investors. Although this case is interesting because it deals with a previously undecided issue, the level of involvement of the firm perhaps left the court with little option but to make its findings in the manner in which it did and little assistance is derived from the case as to what level of involvement is necessary to constitute a breach of the Act. The Court of Appeal ([2005] EWCA Civ 1422, [2005] All ER (D) 347 (Nov)) dismissed the defendants' appeal against the lower court's decision and held that the court does have power to order a restitution order against a

solicitor who appeared to have been knowingly concerned in his client's unauthorised investment business in breach of the Financial Services Act.

Money laundering

[23.10] Anxieties about the effect of s 328 of the Proceeds of Crime Act 2002 (duty to inform NCIS of the suspicion of a money laundering offence) have to a large extent been allayed by the Court of Appeal decision in *Bowman v Fels* [2005] EWCA Civ 226, [2005] 4 All ER 609 (see also [1.3] above). Solicitors acting in litigation became aware of facts which they felt they needed to report under s 328 and they did so. They then made a without notice application to the judge to vacate the trial date because they had been told by NCIS that it was unlikely that the necessary consent to disclosure would be obtained before the trial started. The solicitors acting for the defendant in that litigation appealed the order to vacate. In fact, the litigation between the parties was settled but the Court of Appeal decided that it had jurisdiction to hear the appeal because it involved a point of law in the public interest. The Bar Council, Law Society and NCIS were all granted permission to intervene in the appeal.

[23.11] The court held that s 328 was not intended to cover or affect the ordinary conduct of litigation by legal professionals. This included any step taken by them in litigation up to its final disposal by judgment or consensual resolution by the parties. Parties also had the right to legal advice obtained on a private and confidential basis.

[23.12] It therefore appears that a solicitor is not required to report suspicions under s 328 if they arise during the course of litigation, and that the litigation is enabled to continue unhindered.

Negligence

[23.13] *Cohen v Kingsley Napley (a firm)* [2005] EWHC 899 (QB), [2005] All ER (D) 165 (May), a case involving professional negligence, re-states a well-known principle relating to what law is to be applied when deciding a case. The claimant argued that her case should be decided on the basis of the law as it was understood at the time when her claim arose and in the light of contemporaneous evidence. The court held that case law, and thus the claimant's claim, should be approached as it presently stood. It would be wrong to assess the value of a claim by reference to what, with hindsight, could be seen to be a wrong view of the law. The common law proceeded on the basis that new cases did not change the law but in fact declared what it had always been.

[23.14] The question before the court in *Keydon Estates Ltd v Eversheds LLP* [2005] EWHC 972 (Ch), [2005] All ER (D) 312 (May) was how the claimant's damages should be assessed. The claimant's loss arose out of negligent advice given to him in relation to a property transaction.

The normal rule for assessment of damages in such a case is diminution in value of the property, but the claimant argued here that such an assessment would be unjust because the total loss which it has sustained by way of lost rent alone substantially exceeded what would be recoverable if the diminution in value rule were to be applied.

[23.15] The diminution in value method of assessment is the normal starting point for the assessment of loss in this type of case. It is not, however, a rule of universal application and a different method of assessment can be used if the application of the 'normal' rule would work an injustice to the claimant, contrary to the fundamental rule that the measure of damages should put the injured party in the same position he would have been in had he not suffered the wrong. In allowing the displacement of the diminution in value rule in this case, the court stressed that in adopting a different method of assessment it needed to ensure that the alternative method of assessment would not produce over-compensation or double recovery.

[23.16] The extent of a solicitor's duty of care when acting for a lender (but not also for the borrower) was discussed in *Woolwich plc v Jones-Dunross; Ombull v Sherrards Solicitors (a firm)* [2005] EWHC 1488 (Ch), [2005] All ER (D) 146 (Jul). The defendant solicitors were instructed by the Woolwich in relation to a mortgage transaction arising out of a breakdown of marriage. This involved not only the creation of a mortgage by the husband but also a transfer of property and the signature of a form of consent by the wife. The Woolwich sent forms directly to the husband for signature and he returned them to the solicitors, having signed on his own behalf and having forged the signature of his wife. The solicitors completed the transactions on behalf of the Woolwich without checking the veracity of the signatures. The wife later found out about her husband's dealing with the property and the Woolwich froze the mortgage account and instigated a fraud investigation. This led to a criminal prosecution of the husband but these latter proceedings were aborted when, shortly before the trial, the husband transferred his interest in the property to the wife. In so doing the wife became the beneficial owner of 100% of the property, possibly more than she would have gained from a divorce settlement. As the owner of the whole property she could not in reality have claimed to have suffered any loss as a result of her husband's fraudulent activities. Nevertheless, she pursued an action against the solicitor claiming breach of a duty of care. The question to be decided, therefore, was whether the solicitors, who had been instructed solely to act for the Woolwich, owed any duty to her as a third party non-client. Although there are situations where a solicitor can and does owe a duty to a third party who is not a client (eg to a beneficiary under a will), the court held that in the present circumstances no duty was owed and the claimant's claim failed. The solicitors had been instructed by the Woolwich and only by them. The solicitors had no reason on the face of

the documents presented to them to suspect that there was any reason to think that anything was amiss, and in any event the claimant had suffered no loss.

[23.17] In *Taefi v Jeffrey Green Russell (a firm)* [2005] EWCA Civ 901, [2005] All ER (D) 340 (Jul) the claimant brought proceedings alleging that the defendant solicitors who had acted for him in litigation brought by his landlord had been negligent in as much as they should have settled the claimant's case earlier and in so doing would have saved him costs. On the evidence it was found that the reason why the claimant's litigation with his landlord had not reached an earlier compromise was largely due to the claimant's own intransigence over the question of the payment of his costs by the landlord. In other words, the delay in settlement was due to the claimant's own actions rather than to any breach of duty of care by the defendant.

[23.18] As a result of the defendant's failure to apply for relief against forfeiture the claimant in *Vision Golf Ltd v Weightmans (a firm)* [2005] EWHC 1675 (Ch), [2005] All ER (D) 379 (Jul) lost his lease of a golf course. The defendant solicitors argued that they should not be held wholly responsible for the claimant's loss because another firm of solicitors who the claimant had instructed after terminating its retainer with the defendant firm had also delayed in making an application for relief against forfeiture. They argued that, had the second firm made an application for relief when they had received instructions, the remedy would have been granted and on that basis the defendant should not be held liable for the claimant's entire loss. The defendants were held liable for the entire loss. It was their omission which had led to the loss. The fact that another party might be liable to contribute to the loss did not absolve the defendant from responsibility.

[23.19] It is unusual for a claimant to be held partly responsible for the loss arising out of a negligence claim brought by him against his solicitor. However, this was held to be the case in *Feakins v Burstow* [2005] EWHC 1931 (QB), [2005] All ER (D) 37 (Sep), where the claimant brought an action against the defendant claiming that the latter had been negligent in the conduct of proceedings brought against the Intervention Board for Agricultural Produce to recover 'clawback' on live sheep exports. The claimant contended that the defendant should have raised an issue, relating to 'exempt sheep' and that his failure to do so had resulted in loss to the claimant. It was held that the defendant, while recognising that exempt sheep were an important issue, had failed to investigate the point or to instruct counsel to advise. Had he done so he would have been advised that the point needed to be specifically raised in the litigation. He was therefore in breach of his duty to the claimant. However, the court also held that the claimant had himself been negligent in his handling of the dispute relating to the exempt sheep as a result of this his chances of success with this argument were approximately 60%. His damages would therefore be limited to this percentage of his loss.

[23.20] In *Maden v Clifford Coppock & Carter (a firm)* [2004] EWCA Civ 1037, [2005] 2 All ER 43 (see also [8.29]–[8.30] above) the claimant had brought two separate negligence actions against two separate firms of solicitors, both alleging negligence in connection with advice given in relation to a property dispute. The action against the first solicitors was settled and the claimant received a substantial sum by way of compensation. The question to be decided in the second action was whether the claimant was entitled to damages in the second set of proceedings on the basis that he had been financially compensated through the payment made in settlement of the first set of proceedings. Further, if damages were recoverable in the second set of proceedings, whether those damages should be discounted to take account of the probability that the property dispute would have been settled but for the defendant's negligence. In relation to the first point, the general principle is that a loss which had been compensated for in one set of proceedings could not normally be recoverable in another set of proceedings because it is no longer a loss. However, every case must be looked at on its own facts and in the instant case the two claims and heads of damage were unrelated and did not impinge on each other, thus the recovery of compensation in the first action did not preclude the making of an award in the second. However, in relation to the second point, it was held that the probability that the claimant would have settled his property dispute on terms had he been properly advised by the defendant firm was assessed at 80% and his damages were thus discounted by 20% to take account of this factor.

Privilege

[23.21] The issue of whether or not legal professional privilege prevented disclosure of certain documents in *Burkle Holdings Ltd v Laing* [2005] EWHC 638 (TCC), [2005] All ER (D) 43 (Jun) centred on the question of whether a solicitor had been jointly or separately instructed by the claimant and defendant. In the event it was held that the solicitor had received separate instructions with no intention that advice given to one party should be given to the other. It was stated per curiam in the judgment that the case demonstrates the necessity for a solicitor who is to act for both parties in the same transaction to obtain the written agreement of both before agreeing to act for them, which agreement should set out in detail the nature and scope of the retainer.

[23.22] A slightly different point on privilege arose in *Comfort v Department of Constitutional Affairs* [2005] All ER (D) 96 (Aug), which concerned a re-hearing of an unfair dismissal application remitted by the Employment Appeal Tribunal. In order to elucidate the evidence which had been given at the first hearing, the respondent's solicitor offered to disclose his notes of evidence taken at the first hearing in so far as they related to the disputed issue which concerned the statements of one witness who had given evidence at the first hearing. The claimant

employee then sought an order for the disclosure of the respondent's entire notes in response to which the respondent claimed privilege. It was held by the Employment Appeal Tribunal that a solicitor's notes of evidence taken during an employment tribunal hearing were not protected by privilege (save as to comments or annotations) and an order for disclosure was made. Irrespective of privilege, such notes are not normally the subject of an order for disclosure or exchange but in the present case the absence of the relevant information in either the chairman's notes of evidence or the judgment made such an order desirable.

[23.23] *R (on the application of the Chief Constable of West Yorkshire Police) v Lincoln Crown Court* [2005] EWHC 843 (Admin), [2005] All ER (D) 375 (Apr) concerned the duration of a judge's ruling on disclosure/privilege. In a criminal trial preceding the present proceedings the judge had made an order forbidding the disclosure of certain tapes which included recordings of conversations between the accused and his solicitor in the police station. The judge stayed the trial and the matter was referred to the Independent Police Complaints Commission to investigate possible police misconduct in the recording of those tapes. The claimant, who had been appointed to investigate the alleged misconduct wrote to the judge for permission to analyse the tapes. The judge purported to refuse permission on the grounds of legal professional privilege as a result of which the claimant brought an action for judicial review of the judge's refusal.

[23.24] The claimant's application was allowed, on the basis that its examination of the tapes would not violate the legal professional privilege attached to their contents. Unlike the jurisdiction of the High Court, the jurisdiction of the Crown Court did not extend to all the world for all time. It was a limited jurisdiction extending to the conduct of the proceedings before it. The Crown Court proceedings having been stayed, the judge therefore had no power to make a further order in relation to the tapes, nor could his order pre-empt an independent inquiry by the Commission under its statutory powers.

[23.25] During a criminal trial in *R v Wishart* [2005] All ER (D) 186 (May), the defendant claimed that he had not revealed the existence of an alibi during a police interview, having remained silent on the advice of his solicitor. In the face of an allegation that he had fabricated his alibi the defendant said that he thought that he had mentioned it to his solicitor before the police interview. The judge ordered the solicitor to disclose his notes of the interview and subsequently ordered their full disclosure in the trial on the basis that the defendant had waived privilege. The notes contained admissions of the criminal charges and as a consequence the defendant was convicted on all counts. The defendant appealed against his conviction on the grounds that the judge had wrongly held that the defendant had waived privilege. The appeal was allowed. The defendant's assertion that he had remained silent on the advice of his solicitor was not

a waiver of privilege. Waiver would be involved only where a defendant stated the basis or reason for the legal advice or where it had gone beyond a bare assertion.

Lien

[23.26] The case of *Clifford Harris & Co v Solland International* [2005] EWHC 141 (Ch), [2005] 2 All ER 334 discusses the circumstances in which waiver of a solicitor's lien may occur. The claimants were asking the court to make an order granting a charge over the money paid to the defendants as a result of the settlement of an action in which the claimants had acted for the defendants. The charge was to secure the claimant's costs and disbursements. Prior to the current application, the third and fourth defendants had given the claimants a charge over their house to secure the claimant's costs. The charge contained provision for interest at 8%. The claimant's terms of business made provision for interest on unpaid bills to be paid at 15%. The defendants argued that in taking the charge over the defendants' house the claimant had waived its right to an order under s 73 of the Solicitors Act 1974 (the right for a solicitor to ask for a charge over property recovered through the solicitor's instrumentality for his taxed costs). They maintained that waiver would occur if the claimant did something which was inconsistent with his rights under s 73, and that this had occurred in two ways. First, in accepting the charge over the defendants' house and, secondly, because the interest rate in the charge of the house differed from that in the claimant's terms of business.

[23.27] The court said that 'inconsistency' meant that there was some feature of the security which was incompatible with the lien, such that the rights could not sensibly have been intended to exist in parallel. It was immaterial whether the claimant positively intended to waive, if there was an inconsistency between the two acts waiver would be implied unless the rights under the lien were expressly reserved. However, in the present case there had been an agreement between the parties that the settlement money from the litigation would be used first to pay the claimant's costs and that was sufficient to have created an equitable charge over the settlement money in the claimant's favour, therefore they were entitled to an order under s 73.

[23.28] Two practical points arise out of this decision. First, it appears that a waiver of rights may be implied, perhaps by conduct, and therefore it would be sensible in any situation where a lien exists to ensure that those rights are expressly reserved in writing. Secondly, a solicitor would not be able to recover against a client an interest rate markedly higher than the discretionary rate allowed by the court under s 35A of the Supreme Court Act 1981. The rate stipulated in the claimant's terms of business was markedly higher than the s 35A rate and would probably not have been enforceable against the client. Solicitors should therefore check

the interest provisions in their terms of business to ensure that they comply with s 35A (currently about 8%).

Fees and costs

[23.29] The first case in this section relates to a claim made by solicitors in respect of an unpaid bill (*Fladgate Fielder v Smith* [2005] All ER (D) 264 (May)). The claimants had acted for a company in relation to its disposal of a number of hotels. The defendant (described in the case report as the dominant force within the company) had guaranteed the company's liability to the claimant. When sued for non-payment the defendant raised a defence that the guarantee had been procured by undue influence.

[23.30] To establish undue influence the person so alleging must show that there existed a relationship of trust and confidence and also that the transaction calls for an explanation. A fiduciary relationship exists between solicitor and client thus the first hurdle of the test was automatically satisfied in this case. However, the court found that the defendant was the controlling mind behind the company, which was owned principally by his own family. He was also an experienced businessman. There was nothing out of the ordinary in a situation where a solicitor asked for security for costs, particularly where, as here, the claimant's disbursements included the payment of foreign lawyers' fees. There was nothing questionable about the transaction and no need for the defendant to be invited to take legal advice prior to signing the guarantee. In these circumstances the claimant was entitled to an order for its costs.

[23.31] *Morris v Roberts (Inspector of Taxes)* [2005] EWHC 1040 (Ch), [2005] All ER (D) 393 (May) contains a salutary message to solicitors about pursuing proceedings on behalf of a client where those proceedings have no reasonable prospect of success. The claimant solicitors appealed against a wasted costs order made against them personally in an action commenced by the Inland Revenue (now HM Revenue and Customs) to recover capital gains tax from clients of the solicitor. The case report indicates that the solicitors' clients had been evasive and misleading and that the appeal had been the last of a series of actions and omissions on the part of the taxpayers designed to evade or delay the payment of capital gains tax. The solicitors should have been aware that the appeal was hopeless and as such was an abuse of process. They had occasioned the waste of the Revenue's costs and it was just that a wasted costs order should be made against them. Most solicitors will advise a client to discontinue (or not to commence) proceedings where the case is patently hopeless. If the client declines to accept that advice the prospect of a wasted costs order being made against the solicitor personally may provoke consideration of whether or not the solicitor should terminate his retainer with the client.

Registered foreign lawyers

[23.32] A lawyer from a foreign jurisdiction who wishes to practice in England and Wales must be registered with the Law Society as a 'registered foreign lawyer'. Mr Shuman, the interested party in *R (on the application of the Law Society) v Master of the Rolls (Shuman, interested party)* [2005] EWHC 146 (Admin), [2005] 2 All ER 640 was so registered. He worked in association with a solicitor in practice in London. In 2002, the Law Society intervened in the practice and was to take disciplinary proceedings against Mr Shuman and the solicitor. At that stage Mr Shuman was not actively involved in the practice and he wrote to the Law Society saying that he did not intend to renew his registration as a foreign lawyer when it expired later that year. In view of the impending disciplinary proceedings, the Law Society decided not to cancel Mr Shuman's registration as a foreign lawyer, but instead to impose conditions on the registration relying on para 2(3) of Sch 14 to the Courts and Legal Services Act 1990 (a process which the Law Society seemed to have treated as being analogous to the imposition of a condition on a practising certificate under s 12 of the Solicitors Act 1974). Mr Shuman appealed against the imposition of the condition on his registration. After an analysis of the relevant sections the Master of the Rolls concluded that the Law Society had no general power to impose conditions on the registration of foreign lawyers except on first registration. There is also power to impose conditions when suspension was terminated or a registration revived but (unlike the situation as it relates to solicitors) the Law Society does not have power to impose conditions against a registered foreign lawyer whose name is already on the register. The decision of the Master of the Rolls meant that the conditions imposed on Mr Shuman had to be removed. The Law Society applied for judicial review of the Master of the Rolls' decision which was confirmed by the Divisional Court of the High Court. Without in any way doubting the correctness of this decision as a matter of law, it is nevertheless curious to learn that registered foreign lawyers are treated differently (and possibly less stringently) than solicitors who qualify in England and Wales.

Intervention

[23.33] The Law Society has power to intervene in a solicitor's practice in certain circumstances, for example where it suspects dishonesty or failure to comply with the Solicitors' Accounts Rules. Those powers are exercised under Sch 1 to the Solicitors Act 1974. In *Sheikh v Law Society* [2005] EWHC 1409 (Ch), [2005] 4 All ER 717 the Law Society investigated the claimant's practice and wrote two letters to the claimant asking her to respond to the allegations set out in the correspondence. The claimant did not respond to either letter. As a result, the Law Society referred the matter to the Adjudication Panel of the Law Society's Compliance Board, who were satisfied that grounds for intervention existed and passed a resolution to intervene. The intervention was

commenced on the day following the passing of the resolution. The claimant applied under paras 6(4) and 9(8) of Sch 1 to the Solicitors Act 1974 for an order directing the Law Society to withdraw the intervention.

[23.34] The court said that its jurisdiction under paras 6(4) and 9(8) of Sch 1 to the Solicitors Act 1974 was not to be exercised on grounds analogous to those for judicial review. The court should make up its own mind whether the notice should be allowed to stand subject to the qualifications that the Law Society's own view that the circumstances merited intervention were a relevant factor. In considering the Law Society's views, the court could take into account facts known to the Law Society both at the time of the decision to intervene and knowledge acquired later (ie post-intervention). It was only necessary for the Law Society to show that there were reasons to suspect dishonesty, and at this stage positive proof of dishonesty was not required. In the present case no client money was missing and the reasons for the decision to intervene were not patent. There was no evidence of dishonesty and the breaches of the Solicitors Accounts Rules had not been serious enough to merit intervention. Accordingly, an order was made directing the withdrawal of the intervention. This was therefore a successful and seemingly meritorious challenge to the Law Society's powers of intervention. One can only speculate as to whether intervention would ever have been mooted had the claimant responded to the initial letters sent to her by the Law Society.

[23.35] Another challenge to the Law Society's powers of intervention was made in *Sritharan v Law Society* [2005] EWCA Civ 476, [2005] 4 All ER 1105. In this case the Law Society served notice of its intention to intervene in the claimant's practice on the grounds of suspected dishonesty. Prior to serving the notice, the Law Society had applied for a freezing injunction in respect of the claimant's assets. The claimant issued proceedings seeking an order for the intervention to be withdrawn together with linked applications to restore the claimant's practising certificate, for access to the firm's files and a release of the freezing order. At first instance ([2004] EWHC 2932 (Ch), [2004] All ER (D) 248 (Dec)) the judge found in favour of the Law Society but expressed regret that the remedy which he was empowered to order was effectively an 'all or nothing' remedy. He had power either to uphold the intervention or to order its withdrawal. It was suggested that an 'intermediate' order would in some cases provide a more just solution but that the statute (Solicitors Act 1974) did not make such provision. The matter was then considered by the Court of Appeal, who were asked to decide whether, on an application to withdraw an intervention, there was power for the judge to substitute some extra-statutory remedy in place of the regime under the Solicitors Act. The Court of Appeal held that there was no substitute remedy available. The only options were upholding the intervention or its withdrawal.

[23.36] A different point on intervention arose in *Rose v Dodd (formerly trading as Reynolds & Dodd Solicitors)* [2005] EWHC Civ 957, [2005] All ER (D) 407 (Jul). The issue in this case was whether an intervention by the Law Society is an event which operates to terminate the contract of employment of an employee of the intervened firm, within the terms of s 136(5) of the Employment Rights Act 1996. A termination within s 136 could give rise to a claim by the employee for redundancy or unfair dismissal. The employee in this case has brought a claim for redundancy and unpaid wages following the intervention by the Law Society into the practice by which she was employed. Her claim was dismissed by both an employment tribunal and the Employment Appeal Tribunal and the Court of Appeal was then asked to consider the matter. They affirmed the decision of the Employment Appeal Tribunal and held that on the facts of the case the intervention had not been an event terminating the employee's employment. It is noted that the decision was based on the particular facts of the case, so that it is possible that an intervention may, in different circumstances, effect a termination. Thus, in a similar situation it would be necessary to look at and apply general contractual principles and also to consider the effect of the Transfer of Undertakings (Protection of Employment) Regulations 1981, SI 1981/1794 to see whether the contract had survived the intervention. Similar principles would apply on change or dissolution of partnership and ideally employees' contracts of employment should deal with all these eventualities.

Disciplinary matters

[23.37] This section commences with an open and shut decision. Where a solicitor commits breaches of professional accounts rules the inevitable consequence is that his or her name will be removed from the Roll. This was the short and abundantly clear decision of the Court of Appeal in *Bultitude v Law Society* [2004] All ER (D) 252 (Dec). Lord Justice Kennedy, delivering the judgment of the court, quoted Lord Bingham who, in *Weston v Law Society* (1998) Times, 15 July, had said that the striking off of a solicitor who had been found to have acted dishonestly in relation to clients' moneys must now be seen as all but automatic.

[23.38] A similar result ensued in *Dutton v Law Society* [2005] EWHC 125 (Admin), [2005] All ER (D) 211 (Jan), where a solicitor misused money sent to him by a client. The money was supposed to be held in the solicitor's client account and remitted to a third party as reimbursement of expenses only after the client agreed to the expenses. In fact the money was sent directly by the solicitor to the third party in breach of the agreement with the client and when the agreement between the client and third party broke down the money was not returned by the third party. The solicitor pleaded that he had not been dishonest; however, it was open to the Disciplinary Tribunal to find dishonesty, and it concluded that the solicitor had indeed been dishonest by failing to deal with the money in

the manner agreed with the client. He was struck from the Roll and that decision was upheld by the Divisional Court of the Queen's Bench Division on appeal.

[23.39] The appellant solicitor was also struck off in *Yousef v Solicitors Disciplinary Tribunal* [2005] EWHC 560 (Admin), [2005] All ER (D) 270 (Mar), where the solicitor had had conditions imposed on her practising certificate after a Law Society intervention in the firm in which she had been employed. A partner in the intervened firm had fled the country, taking with him a substantial sum in clients' money. The conditions imposed on the appellant were that she should obtain employment only with the approval of the Office for the Supervision of Solicitors and she would inform any new employer of the conditions to which she was subject. The appellant obtained new employment but did not inform either the Office for the Supervision of Solicitors or her new employer of the conditions to which she was subject. This omission came to the notice of the Law Society which, in the absence of an explanation from the appellant as to her conduct, brought proceedings against her for dishonesty. The issue in the case was whether the appellant should be struck off (as per the decision of the Disciplinary Tribunal) or whether a lesser penalty was more appropriate. The appellant's appeal was dismissed. It was held that the tribunal had been entitled to conclude that the public interest would only properly be protected by striking the appellant off the Roll.

[23.40] The appropriateness of the penalty was also an issue in *Simms v Law Society* [2005] EWHC 408 (Admin), [2005] All ER (D) 281 (Mar), where proceedings were brought against the solicitor, following an intervention. Among the charges raised were dishonesty, and unbecoming conduct. The allegations included that the solicitor had been involved in bogus transactions. He appealed against the decision to strike him off but the Divisional Court upheld the original decision on the basis that the solicitor's allegations of unfairness had not been made out, his conduct could properly be described as dishonest, and thus striking off was inevitable.

[23.41] A further striking off was upheld on appeal to the Divisional Court in *Kilshaw v Office for the Supervision of Solicitors* [2005] EWHC 1484 (Admin), [2005] All ER (D) 207 (Jun). Here a solicitor actually had no client account. The solicitor had appealed both against the severity of the penalty and against the tribunal's refusal to adjourn the proceedings. The solicitor had submitted note from his doctor five days before the hearing date which said that the solicitor was suffering from some symptoms of anxiety and depression. The adjournment was refused and a further application to adjourn made on the day of the hearing was also refused. In holding that the tribunal had been entitled to refuse the adjournment, the Divisional Court took into account the late nature of the application to adjourn coupled with the inadequacy of the accompanying medical evidence and the solicitor's previous conduct.

[23.42] In *Law Society v Wheeler* [2005] EWHC 1602 (Admin), [2005] All ER (D) 288 (Jul) a fine was imposed on Mr Wheeler, who had failed to exercise adequate supervision over another solicitor employed by him. The employed solicitor had previously been struck off the Roll and was employed subject to conditions imposed by the Law Society and with its consent. The issues in the case were whether the tribunal's decision was inconsistent and also whether the tribunal was required to apportion the fine imposed between the various proven charges.

[23.43] Mr Wheeler was also charged with failing to comply with the conditions imposed relating to the employment of the struck-off solicitor. He was acquitted of this charge which had it been proven would have resulted in either striking off or suspension under s 41 of the Solicitors Act 1974. One of these conditions was that Mr Wheeler and his partner should exercise adequate supervision over the work of the struck-off solicitor. On appeal the Law Society argued that the findings of the tribunal were inconsistent. How could Mr Wheeler be acquitted of failing to comply with conditions (one of which related to supervision) and yet be found guilty of not exercising adequate supervision (brought as a separate head of charge)? Mr Wheeler also appealed on similar grounds arguing that if he had been acquitted of the charge relating to the breach of conditions, then it followed that he should also be acquitted of the separate charge of failing to supervise.

[23.44] On appeal it was found that proper supervision had not been provided, therefore Mr Wheeler had been in breach of s 41 and his acquittal of that charge was reversed with a penalty of suspension for 28 days imposed. It was also held that when the tribunal imposes a fine it must apportion that fine between the various proven charges, which it had not done in this case and the fine imposed by the tribunal was set aside. Given Mr Wheeler's good record and his co-operation with the Office for the Supervision of Solicitors, no fine was re-imposed in respect of the lack of supervision charge.

[23.45] The level of the penalty imposed was challenged by the appellant solicitors in *Briggs v Law Society*; *Awoloye Kio v Law Society* [2005] EWHC 1830 (Admin), [2005] All ER (D) 262 (Jul). Mr Briggs had been employed as a solicitor by Mr Kio for several years before he became a salaried partner in the firm in 2001. Mr Kio applied to the Law Society to employ another solicitor who had previously been struck off the Roll and did proceed to employ him on the basis of a letter which purported to be from the Law Society permitting the employment. That letter subsequently turned out to be a forgery. The employed solicitor committed various acts of fraud while working for the partnership and the police, the partnership's insurers and the Law Society were notified of this by the partners when they discovered the misconduct. A further consequence of the fraud was the breach of an undertaking in a conveyancing matter. An investigation by the Law Society into the firm's

accounts revealed breaches of the Solicitors Accounts Rules and proceedings were instigated against both Mr Kio and Mr Briggs. The latter claimed that he had entered the partnership as a result of a misrepresentation by Mr Kio and was therefore able to rescind the agreement and so claimed that he was not a partner at the material time. This argument did not succeed before the tribunal or the Divisional Court, who found that Mr Briggs knew he was a partner and represented himself to the public as such. All the allegations against both partners were held by the tribunal to be substantiated (save one against Mr Briggs). Mr Kio was also found guilty of breach of an undertaking. This breach had been one of the consequences of the fraud by the employed solicitor but it was held that Mr Kio was not without fault regarding the breach. The tribunal had imposed penalties of suspension against both solicitors. Mr Kio was suspended for five years and ordered to pay 80% of the costs, whereas Mr Briggs received a one-year suspension together with an order to pay the remaining 20% of the costs. The Divisional Court upheld the penalty against both solicitors, holding that the proportion of the penalty imposed had been exactly balanced to reflect the seriousness of the offences committed by each and the relative strength of mitigation.

[23.46] The impartiality of the Disciplinary Tribunal was challenged by the appellant solicitor in *Holder v Law Society* [2005] All ER (D) 363 (Jul), where a solicitor was struck off by the Disciplinary Tribunal having been found guilty of charges that he dishonestly used clients' money for his own purposes, had breached the Solicitors Accounts Rules and had been guilty of conduct unbefitting a solicitor. On appeal the appellant argued that the Disciplinary Tribunal was not sufficiently independent or impartial either for the purposes of the common law or under art 6 of the European Convention on Human Rights. He also maintained that the admission in the proceedings of evidence discovered during the investigation by the Office for the Supervision of Solicitors offended the right not to incriminate oneself.

[23.47] His appeal was dismissed. The Divisional Court held that the Disciplinary Tribunal complied with the European Convention on Human Rights, it had an open and transparent method of selection which was overseen by a representative of the Master of the Rolls, and the Law Society had no part in the appointment system. Moreover, the members of the tribunal were not remunerated for their services. The court was not concerned with self-incrimination but rather with the powers of a professional body to protect the public. The tribunal had been entitled on the evidence, together with their impression of the appellant, to conclude that he had dishonestly used his clients' money for his own purposes and that he should be struck off the Roll.

Sport and the Law

EDWARD GRAYSON, MA (OXON)

Barrister of the Middle Temple and of the South Eastern Circuit; Visiting Professor, Sport and the Law, Anglia Polytechnic University; Founder President, British Association for Sport and the Law; Member of the Bar Sports Law Group; Fellow of the Royal Society of Medicine

Introduction

[24.1] Sport and the law during 2005 in the All England Law Reports saw two decisions of the Court of Appeal in its two Divisions, Criminal and Civil, assess the conduct of the two most universally followed sporting pursuits: association football and horse racing.

[24.2] The Criminal Division dealt with what the court erroneously was allowed by counsel to record: ‘until recently, prosecutions in these circumstances [injury caused by one player to another player] were very rare’ (*R v Barnes* [2004] EWCA Crim 3246, [2005] 2 All ER 113 at [4]). Neither the trial judge nor the Court of Appeal was referred to *R v Venna* [1975] 3 All ER 788 at 793f–g. There the Court of Appeal endorsed the first traceable prosecution for criminal liability upon the football field, that *R v Bradshaw* (1878) 14 Cox CC 83 (which resulted in an acquittal on a manslaughter prosecution where the jury were not satisfied that a deliberate and/or reckless charge had been proved): ‘can be read as supporting the view that unlawful physical force applied recklessly constitutes a criminal assault.’

[24.3] The intervening years produced a cascade of cases, summarised in E Grayson *Sport and the Law* (3rd edn, 1999) pp 260–264, and, coincidentally, during the dying years of 2005, a broken jaw in a local soccer match resulting from a punch during the course of play resulted in a Gloucester Crown Court imprisonment of 15 months recorded in *The Times*, 6 January 2006, p 4.

[24.4] The Civil Division of the Court of Appeal considered the necessity of upholding the horse racing world’s Jockey Club’s Rules of Racing for preserving the sport’s integrity to override the basic common law and human rights entitlement to right to work. Neither case established new law but in a period of electronic plethora of citations they have laid down a marker for practitioners and academic researchers to find a way forward when comparable cases emerge inevitably in the future.

Criminal

[24.5] *R v Barnes* (see also [9.1]–[9.30] above) concerned a local Saturday Kent Southern England football match in which the victim suffered a

serious injury to his right ankle and fibula. The referee testified that the defendant had executed his tackle with two feet and would not agree with the explanation that it had been a 'sliding tackle'. The prosecution had alleged one count of unlawfully and maliciously inflicting grievous bodily harm on the victim contrary to s 20 of the Offences against the Person Act 1861.

[24.6] During the course of the trial and appeal hearing, questions of recklessness and consent were canvassed, but what bedevilled the trial and the appeal was the gratuitous and novel introduction into the summing up which the Court of Appeal explained (at [21]):

'could only be guilty if the prosecution had proved that what happened was "not done by way of legitimate sport". He indicated that what the prosecution were alleging was that the appellant's action "for whatever reason it was that he took it, was so reckless that it could not have been in legitimate sport and it was tantamount to an assault".'

[24.7] After the jury retired they sent a note to the judge asking him 'for a recap of the directions on points of law, saying that could be helpful in further deliberation'. Ultimately, the Court of Appeal held (at [29]):

'The jury were not given any examples of conduct which could be regarded as "legitimate sport" and those which were not "legitimate sport" for the purposes of determining whether they were criminal. The jury did not need copies of the rules, but they did need to be told why it was important to determine where the ball was at the time the tackle took place. They should have been told the importance of the distinction between the appellant going for the ball, albeit late, and his "going for" the victim.'

[24.8] The absence of such detailed distinctions meant, per the Court of Appeal (at [30]): 'It is difficult to determine what the [jury thought it] had to decide in order to find the appellant guilty.' The unprecedented intrusion of 'legitimate sport' as distinct from concentrating on the traditional formula of 'unlawful physical force applied recklessly' (as explained in *Venna* and *Bradshaw*) meant that the standard test applied since 1878 was never considered by the jury or the Court of Appeal. Thus the citation of *Barnes* is of value merely as a staging post and misdirection to the jury in the litany of sporting criminal cases which have littered the law reports since 1878.

Civil

[24.9] *Bradley v Jockey Club* [2005] EWCA Civ 1056, [2005] All ER (D) 144 (July) covers the disciplinary powers and sanctions of a powerful sporting governing body, inextricably linked to the powerful gaming industry.

[24.10] The appellant bloodstock agent, who had been a successful steeplechase jockey, breached the rules of racing controlling his licence to practise to an extent which merited disqualification.

[24.11] A network of internal domestic tribunal appeals failed to discharge the ultimate penalty, and as a last resort launched High Court proceedings for breach of contract damages and injunctive relief. Richards J ([2004] EWHC 2164 (QB), [2004] All ER (D) 11 (Oct)) dismissed the claim, for which leave was granted to appeal.

[24.12] In the Court of Appeal the principal argument centred on the proportionality of the penalty in relation to the court's duty to protect Mr Bradley's right to work. The Master of the Rolls, Lord Phillips of Worth Matravers explained (at [24]):

'Where an individual takes up a profession or occupation that depends critically upon observance of certain rules, and then deliberately breaks those rules, he cannot be heard to contend that he has a vested right to continue to earn his living in that profession or occupation.'

[24.13] As a footnote in a concurring judgment, Buxton LJ rejected an argument attempting to rely upon the landmark discriminatory Court of Appeal judgment in *Nagle v Fielden* [1966] 1 All ER 689. Based upon capricious and monopolistic dictatorial criteria, as distinct from seeking to 'undermine disciplinary decisions that were otherwise perfectly lawful'.

[24.14] The disqualification penalty was held not to be disproportionate to breach of the Jockey Club Rules of Racing.

Conclusion

[24.15] These Court of Appeal decisions do not condone violation of sporting regulatory situations. They confirm the right to scrutinise their operations. When the trial judge was ruled offside the law in *Barnes* the conviction was quashed. In *Bradley* the disqualification was upheld to be right.

Statute Law

FRANCIS BENNION, MA (OXON)

Barrister, Research Associate of the University of Oxford Centre for Socio-Legal Studies, former UK Parliamentary Counsel and Lecturer and Tutor in Law at St Edmund Hall in the University of Oxford.
www.francisbennion.com

Introductory note

[25.1] This section of the Review conforms to the Code set out in the fourth edition (2002) of the author's textbook *Statutory Interpretation*, as updated by the 2005 Supplement to that work. Material originating in 2005 which appears in the Supplement is not repeated here.

[25.2] A reference to the relevant section of the Code is given after each heading in the notes below, where the main work is referred to as 'Code'. Page numbers refer to the fourth edition pagination except where they have an S prefix, when they refer to the 2005 Supplement.

Interpreter's duty to arrive at legal meaning (Code s 2, p 14)

[25.3] A word or phrase may have 'a special legal meaning derived from its legislative history': *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] EWCA Civ 92, [2005] 2 All ER 304 at [29].

Duty to obey legislation (Code s 8, p 26)

[25.4] *How far compliance need be exact* As to service of a notice or other document electronically, see *Clark v Midland Packaging Ltd* [2005] 2 All ER 266.

Ignorantia juris neminam excusat (Code s 9)

[25.5] On p 29, at end of footnote 10, insert: See further *Deutsche Morgan Grenfell Group plc v Inland Revenue Commissioners and the Attorney General* [2005] EWCA Civ 78, [2005] 3 All ER 1025.

Mandatory and directory requirements (Code s 10)

[25.6] *General* (pp 30–31) There is a recent tendency of some judges to criticise the long-standing and useful distinction between mandatory and directory requirements as too rigid. However, as Lord Carswell said in *R v Soneji* [2005] UKHL 49, [2005] 4 All ER 321 at [63], there is 'value still in the principles enshrined in the dichotomy, particularly that which relates to substantial performance'.

[25.7] *Jurisdiction* (pp 36–37) Where a court order is a nullity because made without jurisdiction it has no effect for the purposes of any enactment referring to such an order: see, for example, *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 4 All ER 52, [2005] 2 All ER (Comm) 203 at [23], [28] (decision without jurisdiction purporting to be made under Arbitration Act 1996, s 44 not to be treated as made under that section for purposes of sub-s (7) thereof, requiring leave to appeal). See further the *Scherer* principle (*Scherer v Counting Instruments Ltd* [1986] 2 All ER 529) (Code, p 114).

[25.8] In the 2005 Supplement p S5 there is a reference, in connection with footnote 6 on p 33, to *R v McFaul*, *R v Knights* [2002] EWCA Crim 2954, [2003] 3 All ER 508. The *Knights* decision was approved in *R v Knights* [2005] UKHL 50, [2005] 4 All ER 347.

The tort of breach of statutory duty (Code s 14)

[25.9] *Misfeasance in public office* (Code pp 55–56) In footnote 1 on p 56 at end insert: *Attorney General's Reference (No 3 of 2003)* [2004] EWCA Crim 868, [2005] 4 All ER 303.

Administrative or executive agencies (Code s 15)

[25.10] *Government departments* (pp 67–69) In *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 2 All ER 129 at [11], Lord Hoffmann, citing *Harrison v Bush* (1855) 5 E & B 344 at 352, 119 ER 509 at 513, said that the office of Secretary of State is in theory one and indivisible. (For the reasons given in the Comment to Code s 15, this is clearly not the case.) It was held at [32] that a government official who is a decision-maker in relation to an enactment is not, because of knowledge held by another official ‘deemed to know anything which he did not actually know’.

[25.11] *Delegation of administrative powers: the Carltona principle* (pp 70–71) As to the imputation of knowledge held by one relevant government official but not by another, see *Hinchy v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 2 All ER 129 at [11].

Courts and other adjudicating authorities (Code s 19)

[25.12] *Jurisdiction* (pp 80–83) There is statutory authority for drawing a distinction between a court or tribunal (a) exceeding its powers and (b) exceeding its ‘substantive jurisdiction’: Arbitration Act 1996, s 68(2)(b) (see *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2005] 3 All ER 789 at [51]).

[25.13] In footnote 4 on p 81 at end insert: For a different rule in public law and public interest cases see Code p 109.

[25.14] *Ouster of jurisdiction* (pp 83–85) On p 83, after first paragraph under this heading, insert:

The basic distinction is between courts of full jurisdiction and courts of limited jurisdiction. In a case where the issue was the legal meaning of a provision in the Companies Act 1948, s 441 (repealed) that a ‘decision of a judge of the High Court ... on an application under this section shall not be appealable’ Lord Diplock explained this distinction as follows (*Re Racal Communications Ltd* [1981] AC 374 at 384, cited *G v Secretary of State for the Home Department* [2004] EWCA Civ 265, [2005] 2 All ER 882, at [19]) –

‘There is ... an obvious distinction between jurisdiction conferred by a statute on a court of law of limited jurisdiction to decide a defined question finally and conclusively or unappealably, and a similar jurisdiction conferred on the High Court or a judge of the High Court in his judicial capacity. The High Court is not a court of limited jurisdiction and its constitutional role includes the interpretation of written laws. There is thus no room for the inference that Parliament did not intend the High Court or the judge of the High Court acting in his judicial capacity to be entitled and, indeed, required, to construe the words of the statute by which the question submitted to his jurisdiction was defined. There is simply no room for error going to his jurisdiction, nor ... is there any room for judicial review. Judicial review is available as a remedy for mistakes of law made by inferior courts and tribunals only. Mistakes of law made by judges of the High Court acting in their capacity as such can be corrected only by means of appeal to an appellate court, and if, as in the instant case, the statute provides that the judge’s decision shall not be appealable, they cannot be corrected at all.’

[25.15] *Open court principle* (pp 90–92) For the last heading on p S10 of 2005 Supplement (‘After last line insert’) substitute: ‘After last line of Comment on s 19 insert’.

[25.16] After material inserted in p 92 by pp S10–S11 of 2005 Supplement insert:

The court has no power under the Contempt of Court Act 1981, s 11 to restrain publication of evidence given in open court: *R v Hasan* [2005] UKHL 22, [2005] 4 All ER 685 at [2].

Interpretation by adjudicating authorities (Code s 20)

[25.17] *Nature of discretion* (pp 96–97) Four lines from the bottom on p 96, for ‘House of Lords’ substitute ‘Court of Appeal’.

[25.18] *Discretion confused with judgment* (pp 97–98) As to the erroneous contention by the Office of Fair Trading that it has a discretion (rather than a duty to exercise judgment) under the Enterprise Act 2002, s 33(1) see *UniChem Ltd v Office of Fair Trading* [2005] CAT 8, [2005] All ER (D) 02 (Apr).

Doctrine of judicial notice (Code s 21)

[25.19] *Judicial notice of fact* (pp 103–104) In *R (on the application of Gillan) v Metropolitan Police Commissioner* [2004] EWCA Civ 1067,

[2005] 1 All ER 970 at [50], Lord Woolf CJ indicated that the court would take judicial notice of the prevalence of terrorism: 'The scale of terrorist incidents around the globe is so well known that it hardly requires evidence to establish that this country is faced with a real possibility of terrorist incidents.'

Adjudicating authorities with appellate jurisdiction (Code s 23)

[25.20] *Academic points* (p 109) In footnote 8 on p 109 insert at end: See further *Bowman v Fels* [2005] EWCA Civ 226, [2005] 4 All ER 609 (principle of hearing public law cases even where there is no *lis* extended to private law cases of public importance).

[25.21] *Judicial and administrative discretion* (p 110) In footnote 4 on p 110 insert at end: See further *Re J (a child) (return to foreign jurisdiction: convention rights)* [2005] UKHL 40, [2005] 3 All ER 291 at [12].

[25.22] *Court of Appeal* (pp 113–116) In *G v Secretary of State for the Home Department* [2004] EWCA Civ 265, [2005] 2 All ER 882 at [13], Lord Phillips of Worth Matravers MR said:

'The Court of Appeal is a creature of statute and has no jurisdiction other than that accorded by statute or that which is ancillary to such jurisdiction by reason of implication – see *Taylor v Lawrence* [2002] EWCA Civ 90, [2002] 2 All ER 353, [2003] QB 528.'

[25.23] *Appeal from appeal decision* As to restrictions on appealing from an appeal decision see *Uphill v BRB (Residuary) Ltd* [2005] EWCA Civ 60, [2005] 3 All ER 264.

[25.24] In footnote 9 on p 114 insert at end: See further *Cetelem SA v Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 4 All ER 52 at [23], [28], Code p 36.

Judicial review (Code s 24)

[25.25] *Nature of jurisdiction* (p 121) In *R (on the application of The Noble Organisation Ltd) v Thanet District Council (Rosefarm Estates plc and Rank Group plc, interested parties)* [2005] EWCA Civ 782, [2005] All ER (D) 322 (Jun) at [68], the Court of Appeal expressed dissatisfaction –

'at the way the availability of the remedy of judicial review can be exploited – some might say abused – as a commercial weapon by rival potential developers to frustrate and delay their competitors' approved developments... This may be the cause of great economic harm to individual developers and, more importantly, it is likely to frustrate the public interest... However seemingly complicated the issues are, or how sophisticated and technical the statement of facts and grounds supporting the initial claim for judicial review, they should be subject to rigorous examination by the single judge at the permission stage of a claim for judicial review.'

[25.26] *Public law* (pp 119–120) For the case where pursuit of a private remedy instead of judicial review may be an abuse of process, see *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch), [2005] 1 All ER 369.

Dynamic processing (doctrine of precedent) (Code s 26)

[25.27] *Sub-rules* (p 133) After Example 26.2 insert the following:

Example 26.2A In *Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd* [2005] EWCA Civ 134, [2005] 3 All ER 135, the Court of Appeal held that the rule in *The Sardinia Sulcis* (laid down in *The Sardinia Sulcis and Al Tawwab* [1991] 1 Lloyd's Rep 201) should not continue to apply now that it was CPR 19.5 that implemented the Limitation Act 1980, s 35. Jacob LJ said at [37], [40], [42]:

‘Citation of old authorities under different rules simply obscures the debate. *The Sardinia Sulcis* should be allowed to sink back to the ocean bottom ... The jurisdiction is for putting things right ... There is no prejudice to the defendants. They are deprived of an unmeritorious defence arising solely from a blunder by the other side – and that does not count as prejudice.’

[25.28] *Prospective overruling* No court, not even the House of Lords, has power to overrule a decision with effect only for future cases: *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd* [2005] UKHL 41, [2005] 4 All ER 209. Such a profound constitutional change would require legislation.

Definition of an Act (Code s 27)

[25.29] A draft Bill (see 2005 Supplement p S14) was referred to for interpretation of an Act in *Ward v Metropolitan Police Commissioner* [2005] UKHL 32, [2005] 3 All ER 1013 at [27].

Official published editions of Acts (Code s 46)

[25.30] *Statutory Publications Office (SPO)* The Statute Law Database (SLD) is currently under development by the Statutory Publications Office (SPO). When complete, SLD will be published as the official revised version of the UK statute book. The SPO have commissioned a new electronic system for the maintenance of SLD. The new SLD will be made available to government users through the Government Secure Intranet (GSI) following a pilot exercise during the course of 2005. Once the GSI service has been successfully launched, it is planned to release a version of SLD to the general public. This is currently scheduled for Spring 2006.

[25.31] In the meantime, Acts from 1988 onwards can be viewed on the website of the Office of Public Sector Information at www.opsi.gov.uk. Earlier Acts are not available in electronic form because they were printed

in the traditional way. This is ironical in view of the fact that Acts were being officially drafted electronically (by the present author) as early as 1975: see F A R Bennion 'A Computer Experiment in Legislative Drafting' *Computers and Law*, November 1975, www.francisbennion.com/pdfs/fb/1975/1975-004-computers-and-drafting.pdf.

Challenge to validity of an Act (Code s 47)

[25.32] On p 190, before paragraph beginning *Evidence that amendments not agreed*, insert:

As to a case where the Lords did not pass a Bill subsequently enacted under the Parliament Act 1911 (see Code ss 43, 44) see *R (on the application of Jackson and others) v Attorney General* [2005] UKHL 56, [2005] 4 All ER 1253, where the validity of the Parliament Act 1949 was upheld.

Nature of delegated legislation (Code s 50)

[25.33] On p 197, before paragraph beginning *Reasons for delegation*, insert:

Where an Act remodels the primary legislative procedure, as the Parliament Act 1911 did in reducing the power of the House of Lords to reject or delay public Bills (see Code ss 43, 44), the product of the remodelled process is primary rather than delegated legislation: *R (on the application of Jackson) v Attorney General* [2005] UKHL 56, [2005] 4 All ER 1253. In that case the House of Lords (see eg [91]–[93]) upheld the decision of the Divisional Court in *R (on the application of Jackson) v Attorney General* [2005] EWHC 94 (Admin), [2005] All ER (D) 285, where Maurice Kay LJ said at [23]: '... the language of "redefinition" or "remodelling" (the latter being the word used by Francis Bennion in his helpful article 'Is the New Hunting Act Valid?' *Justice of the Peace*, 27 November 2004, 928) is more appropriate than that of "delegation" '.

Meaning of 'commencement' (Code s 71)

[25.34] In footnote 4 on p 231 at end add: Followed in *North British Housing Association Ltd v Matthews and other appeals; London and Quadrant Housing Trust v Morgan* [2004] EWCA Civ 1736, [2005] 2 All ER 667: see Example 319.6A.

Textual amendment (Code s 78)

[25.35] On p 241, at end of paragraph before Example 78.6, delete the passage inserted on p S16 of 2005 Supplement and insert:

(The foregoing has been judicially approved: see *Brown and another v Bennett and others* [2002] 2 All ER 273, at [40]–[42]; *Medcalf v Mardell and others* [2002] UKHL 27, [2002] 3 All ER 721, at [20].)

Presumption against retrospective operation (Code s 97)

[25.36] On p 266, after footnote reference 9, insert:

There is of course no room for the presumption where the enactment is expressly stated to be retrospective.

Example 97.00 The Nationality, Immigration and Asylum Act 2002, s 67(3) says that the section ‘shall be treated as always having had effect’ (see Example 316.9).

Basic rule as to extent of an Act (Code s 102)

[25.37] It is the constitutional practice to frame a provision which limits the extent of an Act to a part only of the territories which are within the jurisdiction of Parliament in a way which does not truncate a discrete portion of those territories, as for example by stating that it extends to England only or to Wales only (England and Wales being still regarded, despite the limited devolution effected by the Government of Wales Act 1998, as a single constitutional unit).

Example 102.2 The Age-Related Payments Act 2004, s 10 says

This Act shall extend only to –

- (a) England and Wales, and
- (b) Scotland.

[25.38] Here it should be noted that there is a difference between extent and effect. An Act may extend to say England and Wales in the sense of forming part of the law of England and Wales even though its effect is felt only in Wales, or even in a part only of Wales (for example, an Act dealing solely with the Millennium Stadium in Cardiff).

[25.39] (For the suggestion that recent changes mean that Wales should now be treated as a separate territory for purposes of extent, see Timothy H Jones and Jane M Williams ‘Wales as a Jurisdiction’ [2004] PL 78; Timothy H Jones, John H Turnbull and Jane M Williams ‘The Law of Wales or The Law of England and Wales?’ [2005] 26 Stat LR 135.)

Presumption of United Kingdom extent (Code s 106)

[25.40] This section of the Code was accepted by the Court of Appeal in *R (on the application of B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [2004] All ER (D) 229 (Oct) at [68], and applied by Stanley Burnton J in *R (on the application of Carson) v Secretary of State for Work and Pensions (Commonwealth of Australia interested party)* [2002] EWHC 978 (Admin), [2002] 3 All ER 994 at [19], where he said:

‘Parliament is presumed to intend an Act to extend to each territory of the United Kingdom, but not to any territory outside the United Kingdom: see *Bennion, Statutory Interpretation*, [4th] edition, at section 106, page [282]. The comity of nations is doubtless one basis for this presumption: one state

should not be taken to interfere with the sovereignty of another state by enacting legislation extending to its territory. Another is practicality: most legislation cannot practically be applied to those present in another state.'

General principles as to application (Code s 128)

[25.41] This section of the Code was accepted by the Court of Appeal in *R (on the application of B) v Secretary of State for Foreign and Commonwealth Affairs* [2004] EWCA Civ 1344, [2004] All ER (D) 229 (Oct) at [68].

Deemed location of an artificial person (Code s 135)

[25.42] *Piercing the corporate veil* In footnote 8 on p 332 at end insert: See further *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, [2005] 4 All ER 391 at [45]–[48].

Applying the enactment to the facts (Code s 136)

[25.43] *Recusal by judge* (p 335) As to recusal by a judge, see *Phillips v Symes* [2004] EWHC 2330 (Ch), [2005] 4 All ER 519, [2005] 2 All ER (Comm) 538 at [41]–[51].

Opposing constructions of an enactment (Code s 149)

[25.44] *The adversarial system* (pp 371–372) At end of passage inserted at p 371 by 2005 Supplement p S20 insert:

In *R (on the application of H) v Secretary of State for Health* [2004] EWCA Civ 1609, [2005] 3 All ER 468, at [27], Buxton LJ rebuked counsel for saying she was 'neutral' on which of two possible courses the court should take. The court may raise a point of its own motion (see e.g. *R (on the application of Khadir) v Secretary of State for the Home Department* [2005] UKHL 39, [2005] 4 All ER 114, at [10]).

When implications are legitimate (Code s 174)

[25.45] *Implied ancillary powers* (pp 429–430) On p 429, in footnote 5, at end insert:

This passage of the Code was upheld in *Ward v Metropolitan Police Commissioner and another* [2005] UKHL 32, [2005] 3 All ER 1013, at [23].

[25.46] On p 430, after Example 174.4 insert:

Example 174.5 Without specific statutory power, a local authority can set up an inquiry for any purpose connected with its functions: see *Oxfordshire County Council v Oxford City Council and another* [2005] EWCA Civ 175, [2005] 3 All ER 961, at [110].

[25.47] On p 430, in footnote 1, at end insert: This decision was followed in *Ward v Metropolitan Police Commissioner* [2005] UKHL 32, [2005] 3 All ER 1013 at [23].

[25.48] On p 430, in footnote 7, insert after the reference to *Symphony Group plc v Hodgson* a reference to *Phillips v Symes* [2004] EWHC 2330 (Ch), [2005] 4 All ER 519.

Interstitial articulation by the court (Code s 179)

[25.49] *Example 179(7)* (p 438) Renumber Example 179.7 added by 2005 Supplement p S23 as Example 179.6A and insert the following:

Example 179.6B Dyson LJ held that the reference in CPR 52.13(2)(a) to ‘an important point of principle or practice’ should be treated as if the words ‘that has not yet been established’ were included at the end (see *Uphill v BRB Residuary Ltd* [2005] EWCA Civ 60, [2005] 3 All ER 264, at [18]).

Example 179.6C Lightman J held that the statement in CPR 1.3 that the parties are required to help the court further the objective of dealing with cases justly should be treated as if the words ‘That must include assisting the court to further the objective by co-operating with each other’ were included at the end (see *Hertsmere Primary Care Trust and others v Administrators of Balasubramaniam’s Estate and another* [2005] EWHC 320 (Ch), [2005] 3 All ER 274, at [11]).

The plain meaning rule (Code s 195)

[25.50] *Composite formula* After the passage with this heading in 2005 Supplement p S24 insert:

In *Morgans v Alpha Plus Security Ltd* [2005] 4 All ER 655, at [22.3], Burton J said leaving it to the good sense of the employment tribunal when deciding on the amount of compensation under the Employment Rights Act 1996, s 123 to determine when and whether and to what extent to disregard receipts by the claimant would be ‘to legitimise the palm tree justice which Brooks LJ and Lord Steyn deprecated in *Dunnachie’s* case (see [2004] 3 All ER 1011 at [26])’.

(See *Dunnachie v Kingston-Upon-Hull City Council* [2004] UKHL 36, [2004] 3 All ER 1011.)

Statutory definitions (Code s 199)

[25.51] *Potency of the term defined* (pp 480–482). On p 480, before Example 199.2. insert –

Thus in *MacDonald (Inspector of Taxes) v Dextra Accessories Ltd and others* [2005] UKHL 47, [2005] 4 All ER 107, at [18], Lord Hoffmann said:

‘... a definition may give the words a meaning different from their ordinary meaning. But that does not mean that the choice of words adopted by Parliament must be wholly ignored. If the terms of the definition are ambiguous, the choice of the term to be defined may throw some light on what they mean.’

The Interpretation Act 1978 (Code s 200)

[25.52] The term 'person' (pp 492–493) In footnote 1 on p 492 at end insert: See further *Huntingdon Life Sciences Group plc and another v Cass and others* [2005] EWHC 2233 (QB), [2005] 4 All ER 899.

The 'context' of an enactment (Code s 202)

[25.53] On p 503, at end of text, insert:

Example 202.2 In *MacDonald (Inspector of Taxes) v Dextra Accessories Ltd and others* [2005] UKHL 47, [2005] 4 All ER 107, the House of Lords construed the Finance Act 1989, s 43(1)(a) by reference to a later enactment. The favoured construction would give rise to an anomaly unfair to the taxpayer. Lord Hoffmann said at [20] –

'But precisely that result has been achieved by s 143 and Sch 24 to the Finance Act 2003, which replaced s 43(1)(a) ... The anomaly and unfairness has therefore not troubled a more recent Parliament and may not have troubled the Parliament of 1989.'

The pre-Act law (Code s 210)

[25.54] In footnote 1 on p 513 add a reference to *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] EWCA Civ 92, [2005] 2 All ER 304.

Codifying Acts (Code s 212)

[25.55] *Correction of error* On p 519 the words ending '... consistent with the Act' following the indicator for footnote 5 should be moved to the end of the footnote.

Use of committee reports leading up to Bill (Code s 216)

[25.56] In *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] EWCA Civ 92, [2005] 2 All ER 304 at [15], Mummery LJ said of the Limitation Act 1980, s 24(1):

'In interpreting s 24(1) the court is not entitled to take into account [the recommendations of the Law Reform Committee] acted on by Parliament in the subsequent legislation, but it is entitled to have regard to the statements contained in the report of the mischief aimed at and of the state of the law as it was then understood to be by the Committee ...' (emphasis added).

[25.57] It is submitted that, in the light of dicta cited in the Comment to Code s 216, the italicised words are not good law; and that it is open to the court in such a case to have regard to all statements made in the report, giving each the weight to which it is entitled according to the fact of the matter.

Use of explanatory memoranda (Code s 219)

[25.58] *Textual memoranda* (p 544)

An alternative to the distribution of an individual textual memorandum to MPs or peers considering a Bill which makes extensive textual amendments to an Act is the current practice of making such a memorandum available in the Library of the House. (See eg Lords *Hansard*, 11 October 2005, col 167 (Racial and Religious Hatred Bill).)

Special restriction on parliamentary materials (the exclusionary rule) (Code s 220)

[25.59] *Contrary to principle* (pp 546–547) The growing judicial disillusionment with the rule in *Pepper v Hart* [1993] 1 All ER 42 is reflected in Lord Hoffmann's comment in *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2005] UKHL 28, [2005] 2 All ER 555 at [34], following citation of *Hansard* by opposing counsel as authority for rival contentions, that '[as] is almost invariably the case when such statements are tendered under the rule ... I found neither of any assistance'.

[25.60] *Article 9 of Bill of Rights* (pp 567–569) For the effect of art 9 of the Bill of Rights 1689 in protecting Members of Parliament from defamation proceedings see *Buchanan v Jennings* [2004] UKPC 36, [2005] 2 All ER 273.

Nature of legal policy (Code s 263)

[25.61] *Obedience to Parliament* (p 668) After Example 263.7B insert:

The parliamentary authorisation of conditional fee agreements (CFAs) was a departure from traditional legal policy. In *Campbell v MGN Ltd (No 2)* [2005] UKHL 61, [2005] 4 All ER 793, at [54], Lord Carswell said:

'It has to be said that there are many who regard the imbalance in the system adopted in England and Wales as most unjust. The regimen of CFAs and the imposition of these charges upon the losing party is, however, legislative policy which the courts must accept ...'

[25.62] The same applies to the confiscation of property acquired by criminal means.

Example 263.7C In *R v Soneji* [2005] UKHL 49, [2005] 4 All ER 321, at [2], Lord Steyn said: 'Parliament has firmly adopted the policy that in the fight against serious crime, apart from ordinary sentences, a high priority must be given by the courts to the making of confiscation orders against defendants convicted of serious offences.'

[25.63] This sort of guidance by Parliament has been called a 'legislative steer': see *Re Peters* [1988] 3 All ER 46 at 51; *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, [2005] 4 All ER 391 at [20], [43].

[25.64] *Categories of legal policy: Morality* (pp 666–667) It is because the final arbiter of legal policy in criminal matters should be the humble

juror that the judge is not allowed to instruct the jury to return a guilty verdict: *R v Wang* [2005] UKHL 9, [2005] 1 All ER 782.

Law should be just (Code s 265)

[25.65] *Fairness* (pp 680–681) After Example 265.5 on p 681 insert:

In dealing with any matter involving the Crown ‘the court must be alert to see that its jurisdiction is not being conscripted to the service of any arbitrary or unfair action by the state’: *Jennings v Crown Prosecution Service* [2005] EWCA Civ 746, [2005] 4 All ER 391, at [56].

Law should be certain and predictable (Code s 266)

[25.66] *Legal certainty* (p 683) The purpose of the Arbitration Act 1996 was to reduce drastically judicial intervention in the arbitration process and promote one-stop adjudication: *Lesotho Highlands Development Authority v Impregilo SpA* [2005] UKHL 43, [2005] 3 All ER 789 at [26], [33].

Principle against penalisation under a doubtful law (Code s 271)

[25.67] *General* (p 705) In *R v Z* [2005] UKHL 35, [2005] 3 All ER 95 at [16], Lord Bingham of Cornhill referred to –

‘... the important principle of legal policy, exemplified by *Tuck & Sons v Priester* (1887) 19 QBD 629, that *a person should not be penalised except under clear law*, should not (as it is sometimes said) be put in peril on an ambiguity: see *Bennion on Statutory Interpretation* (4th edn, 2002) p 705.’ (Emphasis added; the italicised words repeat the formulation in Code s 271).

[25.68] The finding of the House of Lords in this case that the Real IRA was a proscribed organisation was contrary to the view of the present author as expressed in ‘Is the Real IRA a Proscribed Organisation?’ 168 JP (19 June 2004) 472 and ‘The IRA is Proscribed After All’ 168 JP (4 September 2004) 694.

Statutory interference with rights of legal process (Code s 281)

[25.69] *Right of litigious control* (pp 730–732) After second complete paragraph on p 731 insert:

The court will construe narrowly any enactment which appears to restrict the rights of parties and legal advisers in relation to litigation. See eg *Bowman v Fels* [2005] EWCA Civ 226, [2005] 4 All ER 609 (construction of Proceeds of Crime Act 2002, s 328). For such an enactment see Courts and Legal Services Act 1990, s 28 (rights to conduct litigation).

[25.70] *Neutral citation of judgments* (p 732) From 14 January 2002 the practice of neutral citation of judgments was extended to all judgments given by judges in the High Court in London: see *Practice Direction* [2002] 1 All ER 351, para 1. ‘Although the judges cannot dictate the form in which law publishers reproduce the judgments of the court, this form of

citation contains the official number given to each judgment which they hope will be reproduced wherever the judgment is republished, in addition to the reference given in any particular series of reports': see *ibid*, para 6.

Presumption favouring consequential construction (Code s 286)

[25.71] After fifth line on p 747 insert:

Example 286.0 In *9 Cornwell Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2005] EWCA Civ 324, [2005] 4 All ER 1207 the Court of Appeal considered the *Cadogan v Morris* principle, where the consequences of specifying an artificial price in a statutory notice are considered to be so adverse as to invalidate the notice.

(See *Cadogan v Morris* (1999) P & CR 336.)

Presumption that updating construction to be given (Code s 288)

[25.72] In footnote 3 on p 763, at end insert: See further *Oxfordshire County Council v Oxford City Council and another* [2005] EWCA Civ 175, [2005] 3 All ER 961 at [85], [86].

[25.73] *Changes in the mischief* (pp 767–768) In Example 288.3A (inserted by the 2005 Supplement p S36) the reference to 'the same genus of facts' echoes the dictum of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] 1 All ER 545 at 564–565, [1981] AC 800 at 822 that when a new state of affairs bearing on the policy of an Act comes into existence it may be held within the Act if it falls within 'the same genus of facts as those to which the expressed policy has been formulated'. On this see *R (on the application of Quintavalle) v Human Fertilisation and Embryology Authority* [2005] UKHL 28, [2005] 2 All ER 555 at [30].

[25.74] *Changes in relevant law* (pp 768–771) In footnote 5 on p 768, at end insert: See further *Oxfordshire County Council v Oxford City Council and another* [2005] EWCA Civ 175, [2005] 3 All ER 961 at [85], [86].

British and European versions of purposive construction (Code s 311)

[25.75] At end of Comment on p 830 insert:

In *Shanning International Ltd v Rasheed Bank* [2001] UKHL 31; [2001] 1 WLR 1462, Lord Steyn said at [24] –

'There is an illuminating discussion in *Cross, Statutory Interpretation*, 3rd ed. pp 105–112 of the correct approach to the construction of instruments of the European Community ... The following general guide provided by Judge Kutscher, a former member of the European Court of Justice, is cited by *Cross* (at p 107):

'You have to start with the wording (ordinary or special meaning). The Court can take into account the subjective intention of the legislature and the function of a rule at the time it was adopted. The provision has to be interpreted in its context and having regard to its schematic

relationship with other provisions in such a way that it has a reasonable and effective meaning. The rule must be understood in connexion with the economic and social situation in which it is to take effect. Its purpose, either considered separately or within the system of rules of which it is a part, may be taken into consideration.”

Cross points out that of the four methods of interpretation – literal, historical, schematic and teleological – the first is the least important and the last the most important. *Cross* makes two important comments on the doctrine of teleological or purposive construction. First, in agreement with *Bennion, Statutory Interpretation*, [4th] ed, s 311, *Cross* states that the British doctrine of purposive construction is more literalist than the European variety, and permits a strained construction only in comparatively rare cases. Judges need to take account of this difference. Secondly, *Cross* points out that a purposive construction may yield either an expansive or restrictive interpretation.’

Presumption that ‘absurd’ result not intended (Code s 312)

[25.76] The fact that ‘absurdity’ can still be given its ordinary narrow meaning of contrary to reason is illustrated by *R v Connor, R v Mirza* [2004] UKHL 2, [2004] 1 All ER 925 at [25], where Lord Steyn said of the Contempt of Court Act 1981, s 8(1): ‘the notion that the Court of Appeal could be in contempt of itself if it exercised the jurisdiction to hear evidence about what happened in the jury room is an absurdity’ (emphasis by Lord Steyn). See further *A-G v Scotcher* [2005] UKHL 36, [2005] 3 All ER 1 at [25].

[25.77] *Strained construction* The court will apply a strained construction to avoid any form of absurdity. Thus in *Office of the King’s Prosecutor, Brussels v Cando Armas* [2004] EWHC 2019 (Admin), [2005] 2 All ER 181, Stanley Burton J said (at [25]) of a proffered construction of the Extradition Act 2003, s 65: ‘This result is so absurd that we would strain not to interpret the 2003 Act as producing it.’ He added at [31]:

‘Regrettably, ss 64 and 65 of the 2003 Act have not been drafted with the need to deal with trans-frontier offences taken expressly or clearly into account. We have reached our conclusion because of the need to arrive at a workable interpretation ...’

[25.78] See further as to strained construction in relation to ‘absurdity’ Code pp 833–834.

Avoiding an unworkable or impracticable result (Code s 313)

[25.79] Insert the following after Example 313.00 (added by 2005 Supplement, p S38):

Example 313.000 In *Re Loftus (deceased), Green and others v Gaul and others* [2005] EWHC 406 (Ch), [2005] 2 All ER 700, it was held that for the purposes of the Limitation Act 1980, s 22(a) time did not run (as might have been plausible) from the completion of an administration because that

reading would have meant that in some cases the limitation period would never begin, rendering the Act unworkable.

Avoiding an inconvenient result (Code s 314)

[25.80] *Unnecessary technicality* (p 840) In *Hinchey v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 2 All ER 129 at [49], Baroness Hale of Richmond said that, in the case of a complex statutory system, ‘if the specialist judiciary who do understand the system and the people it serves have established consistent principles, the generalist courts should respect those principles unless they can clearly be shown to be wrong in law’.

Avoiding an anomalous or illogical result (Code s 315)

[25.81] *Where anomaly intended* (pp 854–855) On the reasons for having statutes of limitation, see further *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] EWCA Civ 92, [2005] 2 All ER 304 at [30], [31].

[25.82] In footnote 4 on p 854 at end insert: For an example of an intended anomaly see Example 202.2.

Avoiding a futile or pointless result (Code s 316)

[25.83] *Literal meaning too strong* (p 861) After Example 316.8 insert:

Example 316.9 In *R (on the application of Khadir) v Secretary of State for the Home Department* [2005] UKHL 39, [2005] 4 All ER 114, the House of Lords held that the Nationality, Immigration and Asylum Act 2002, s 67 was an unnecessary enactment since what it purported to provide had always been the law.

Presumption that evasion of Act not allowed (Code s 319)

[25.84] *Fraud on an Act* (pp 868–870) Insert the following on p 870 before Example 319.7:

Example 319.6A An adjournment of legal proceedings whose sole purpose is to await a future event which will defeat a claim is improper: *North British Housing Association Ltd v Matthews and other appeals; London and Quadrant Housing Trust v Morgan* [2004] EWCA Civ 1736, [2005] 2 All ER 667, at [35] (adjournment would have defeated policy of Housing Act 1988 and the right it conferred on a landlord).

Presumption that ancillary rules of law intended to apply (Code s 327)

[25.85] *Introductory* (p 887) The common law can be used to supplement deficiencies in an Act. Thus in *Government of Germany v Kleinschmidt* [2005] EWHC 1373 (Admin), [2005] 3 All ER 759 at [54], Sedley LJ said of the Extradition Act 2003:

‘Since, remarkably, no provision is made in or under the Act for ensuring that defendants receive necessary documents in good time, the justice of the common law (as Byles J once called it) will supplement Parliament’s prescription ...’

[25.86] *Vacant provisions* (p 892) Where an Act contains what may be called a vacant provision, that is one unfurnished with details of the kind which must obviously be taken to be implied, the court will assume that the legislator intended it to draw on relevant ancillary rules for this purpose.

Example 327.8C The Insolvency Act, s 375(1) says that every court having jurisdiction for certain purposes may review, rescind or vary any order made by it in the exercise of that jurisdiction. This is a vacant provision because obviously all kinds of details need to be filled in by the courts as circumstances require. In *Papanicola (a trustee in bankruptcy for Mak) v Humphreys* [2005] EWHC 335 (Ch), [2005] 2 All ER 418, at [25], Laddie J drew up six infilling propositions derived from existing legal principles. He added a seventh by saying, at [37], ‘the philosophy underlying CPR 39.3(3)–(5) applies’.

Presumed application of constitutional law rules (Code s 328)

[25.87] At beginning of third line on p 900 insert side heading *Civil and criminal law contrasted*.

[25.88] In footnote 3 on p 900 insert at end: See further *A-G v Able* [1984] 1 All ER 277 at 283–284, [1984] QB 795; *Bowman v Fels* [2005] EWCA Civ 226, [2005] 4 All ER 609, at [18].

Law regulating decision making (Code s 329)

[25.89] *Proportionality* (p 904) (1) After indicator for footnote 5 insert: The doctrine of proportionality also applies in other areas of law. (2) After indicator for footnote 6 insert: It applies to charges of professional misconduct (see *Giele v General Medical Council* [2005] EWHC 2143 (Admin), [2005] 4 All ER 1242, at [17]).

[25.90] *Procedural propriety* (pp 904–908) After line 3 on p 907 insert:

The outcome afforded by public law to a frustrated legitimate expectation may be to set aside the procedural consequences normally applicable in the situation.

Example 329.0 The applicant for judicial review had ticked the wrong box when filling in a form for renewal of an exemption from payment of the London congestion charge. When he explained this to an official of the relevant authority, Transport for London, he was told that the penalties laid down would not apply. Nevertheless he continued to be served with penalty notices and finally his car was impounded. Collins J in the Administrative Court held despite the formal statutory provisions the penalties were not to be levied and the car must be returned. He said –

‘There was, if one puts it in public law terms, a legitimate expectation created by the misinformation given to Mr Dolatabadi, coupled with the failure to respond properly to the letters he had written ... He clearly acted to his detriment in the result.’ (*R (on the application of Bijan Dolatabadi) v Transport for London* [2005] EWHC 1942 (Admin) at [25].)

Presumed application of rules of tort law (Code s 333)

[25.91] After Example 333.2 on p 920 insert:

There is a ‘long-standing and clear presumption that Parliament does not intend to authorise tortious conduct except by express provision’: *R (on the application of W) v Metropolitan Police Commissioner and another (Secretary of State for the Home Department, interested party)* [2005] EWHC 1586 (Admin), [2005] 3 All ER 749, per Brooke LJ at [33] (alleged power of police to remove child under Anti-social Behaviour Act 2003, s 30(6) where child not offending). The court cited *Morris v Beardmore* [1980] 2 All ER 753, [1981] AC 446: see Code p 966.

Presumed application of rules of criminal law (Code s 334)

[25.92] *Right to silence* (pp 926–928) In footnote 8 on p 927 (as amended in 2005 Supplement p S41) at end insert: *R v Becouarn* [2005] UKHL 55, [2005] 4 All ER 673.

Presumed application of rules of evidence (Code s 335)

[25.93] *Hearsay* In footnote 1 on p 933 at end insert: As to hearsay evidence see *Moat Housing Group South Ltd v Harris and another* [2005] EWCA Civ 287, [2005] 4 All ER 1051, at [131]–[135].

[25.94] *Expert evidence* (pp 934–935) As to the duties of an expert witness see *Phillips v Symes* [2004] EWHC 2330 (Ch), [2005] 4 All ER 519.

Reliance on illegality: *allegans suam turpitudinem non est audiendus* (Code s 340)

[25.95] On p 953, before side heading *Construction in bonam partem*, insert:

Effect on interpretation Where an enactment specifies a state of affairs it may be necessary to determine whether it applies if there is an element of illegality.

Example 340.6 The Domicile and Matrimonial Proceedings Act 1973, s 5(2) referred to a person’s domicile or habitual residence in England and Wales. The question arose whether this applied where the person’s presence in England and Wales was unlawful: *Mark v Mark* [2005] UKHL 42, [2005] 3 All ER 912.

Necessity: *necessitas non habet legem* (Code s 347)

[25.96] *Duress* (p 974) (1) In footnote 4 on p 974 at end insert: But see *R (on the application of H) v Secretary of State for Health* [2005] UKHL Civ 1609, [2005] 4 All ER 1311, at [5]; (2) For the reference given for *R v Hasan* at p S44 of the 2005 Supplement substitute [2005] UKHL 22, [2005] 4 All ER 685.

Judge in own cause (Code s 348)

[25.97] *Application to non-judicial decisions* (pp 978–979) The principle discussed in this section also applies where under statute a person such as a guardian ad litem, litigation friend or personal adviser is appointed to represent or assist someone involved in a statutory procedure.

Example 348.3 A personal adviser S, a member of the local authority's own staff, was appointed for J by a local authority under the Children Act 1989, s 23D, added by the Children (Leaving Care) Act 2000, s 3. In *R (on the application of J) v Caerphilly County Borough Council* [2005] EWHC 586 (Admin) at [27], [30] Munby J held –

‘... there is nothing either in the general law or in the relevant legislation which makes it either unlawful or necessarily undesirable to appoint as the personal adviser of a child in care an officer or employee of the local authority which is the child's statutory parent. On the other hand, if such a person is appointed, it is important that both he or she and the local authority should recognise that the personal adviser is indeed acting in that role and not in some other, let alone conflicting, role. That, unfortunately, seems not to have been appreciated in the present case ... It is not part of the personal adviser's functions to undertake the statutory assessment or the preparation of the pathway plan, nor should he do so. The regulations, in my judgment, show that it is not permissible for him to do so. It is in any event undesirable that he should do so. Part of the personal adviser's role is, in a sense, to be the advocate or representative of the child in the course of the child's dealings with the local authority. As the Children Leaving Care Act Guidance puts it, the personal adviser plays a “negotiating role on behalf of the child”. He is, in a sense, a “go-between” between the child and the local authority. His vital role and function are apt to be compromised if he is, at one and the same time, both the author of the local authority's pathway plan and the person charged with important duties owed to the child in respect of its preparation and implementation.’

Agency (Code s 351)

[25.98] In footnote 4 on p 986 at end insert: As to service by the internet see *Smith v Tyne and Wear Autistic Society* [2005] 4 All ER 1336. As to service by fax see *Woodward v Abbey National plc, JP Garrett Electrical Ltd v Cotton* [2005] 4 All ER 1346.

Volenti principle (Code s 353)

[25.99] *Criminal breach* (p 988) It is not contrary to public policy to treat consent to injury as exculpatory where the consent is deemed to have been given by the victim having agreed to take part in an innocent event, such as a sporting fixture, where personal injury is likely to occur. Consent will not, however, be so deemed to have been given if the injury is disproportionate: see *R v Barnes* [2004] EWCA Crim 3246, [2005] 2 All ER 113 (conviction of footballer of breach of Offences against the Person Act 1861, s 20 quashed). Lord Woolf LCJ said (at [11]):

‘The advantage of identifying that the defence is based upon public policy is that it renders it unnecessary to find a separate jurisprudential basis for application of the defence in the various different factual contexts in which an offence could be committed. For example, it explains why boxing, despite the fact that participants intend to hurt each other, is ordinarily considered a lawful sport, whereas prize-fighting is not. It also means that changing public attitudes can affect the activities which are classified as unlawful, as the judgment in *R v Dica* demonstrates.’

[25.100] Lord Woolf LCJ had said at [10]:

‘*R v Dica* [2004] EWCA Crim 1103, [2004] 3 All ER 593 considers the position where, as a result of having sexual intercourse with two women, a male defendant who is HIV positive infects them so that they both are subsequently diagnosed as being HIV positive. This court held that the man would be guilty of an offence contrary to s 20 of the 1861 Act if, being aware of his condition, he had sexual intercourse with them without disclosing his condition. On the other hand, this court considered that he would have a defence if he had made the women aware of his condition, but with this knowledge they were still prepared to accept the risks involved ...’

Construction of Act or other instrument as a whole (Code s 355)

[25.101] *Every word to be given meaning* (pp 993–994) In the addition made by the 2005 Supplement p S46 to footnote 9 on p 993, at end insert:

To the like effect was the ruling by the Administrative Court that ‘grossly’ in the Communications Act 2003, s 127(1)(a) required ‘some added value’ to be given: see *Director of Public Prosecutions v Collins* [2005] EWHC 1308 (Admin), [2005] 3 All ER 326, at [5]. See further *R v J* [2004] UKHL 42, [2005] 1 All ER 1, at [20], [47] and Example 319.7A.

Homonyms (Code s 373)

[25.102] In footnote 9 on p 1042, at end insert: See also 9 *Cornwell Crescent London Ltd v Kensington and Chelsea Royal London Borough Council* [2005] EWCA Civ 324, [2005] 4 All ER 1207 (‘proposed purchase price’).

Noscitur a sociis principle (Code s 378)

[25.103] On p 1052, in footnote 2, for ‘See’ substitute:

In *R (on the application of Keating and others) v Cardiff Local Health Board (Secretary of State for Health, intervening)* [2005] EWCA Civ 847, [2005] 3 All ER 1000, at [42], Brooke LJ said that ‘facilities’ is ‘a chameleon-like word’ which ‘takes its colour from its context’. See further

***Ejusdem generis* principle: description of (Code s 379)**

[25.104] In p 1055 insert after Example 379.1:

Example 379.1A In *R (on the application of the Lord Chancellor) v Chief Land Registrar (Barking and Dagenham London Borough Council, interested party)* [2005] EWHC 1706 (Admin), [2005] 4 All ER 643, at [23], Stanley Burnton J said: ‘The context I am considering is the transfer of “property, rights or liabilities”, and in this context it would be anomalous to construe “property” as meaning something physical, when there is a clear non-physical genus’.

***Reddendo singular singulis* principle (Code s 388)**

[25.105] Lord Thring said (*Practical Legislation* (London, John Murray, 1902, p 52) –

‘However great his difficulty, the draftsman must exclude any necessity for the adoption of the rule of *reddendo singular singulis*, or reading the sentences distributively; a rule which, like other rules of construction, has arisen from the obligation imposed on the courts of attaching an intelligible meaning to confused and unintelligible sentences.’

Interpretation of Community law (Code s 410)

[25.106] *Subsections (4) and (5)* (pp 1104–1105) The like interpretative rules as are applicable at common law (see Code Parts XI–XV) are presumed to apply to Community law unless the contrary is shown, for example the commonsense construction rule (see Code s 197) has been so applied: see *Secretary of State for Work and Pensions v Bobezes* [2005] EWCA Civ 111, [2005] 3 All ER 497 at [41].

Effect of Community law on UK enactments (Code s 413)

[25.107] In footnote 6 on p 1115 at end insert: ‘See also *White v White and another* [2001] UKHL 9, [2001] 2 All ER 43, where Lord Cooke of Thorndon, at [31], commended the treatment in this Comment.’

UPDATING OF PART XXX OF MAIN WORK AS CONTAINED IN SUPPLEMENT

***Introduction* (pp S53–S56)**

[25.108] On p S54, insert the following after second paragraph (beginning ‘Unfortunately ...’):

Problems caused by the complexities introduced into British law by the Human Rights Act 1998 are illustrated by *R (on the application of SB) v Governors of Denbigh High School* [2005] EWCA Civ 199, [2005] 2 All ER 396. In the Court of Appeal a Muslim schoolgirl won the right to wear the jilbab, which conceals the shape of the wearer's arms and legs, even though it infringed the school's policy regarding uniforms. The Court of Appeal found for the pupil because, although the school might have succeeded if they had dealt with the matter as the law required, they approached the relevant issues from the wrong direction (see [88]).

The school's Complaints Committee complained in their turn that they did not have the legal knowledge needed to interpret the complex legislation governing the matter ([58]). Brooke LJ said 'one is bound to sympathise with the teachers and governors of this school when they have to try and understand quite complex and novel considerations of human rights law in the absence of authoritative written guidance' ([82]). Mummery LJ said –

'I agree with Brooke LJ on the need for teachers and governors to be given authoritative written guidance on the handling of human rights issues in schools. There are many issues that members of the staff, parents and pupils could raise under [the HRA] in respect of most of the articles in the Convention. Head teachers and governors of all kinds of schools need help to cope with this additional burden. They need to be made aware of the impact of [the HRA] on schools. They need clear, constructive and practical advice on how to anticipate and prepare for problems, how to spot them as and when they arise and how to deal with them properly. It would be a great pity if, through lack of expert guidance, schools were to find themselves frequently in court having to use valuable time and resources ... ([89])'

This is tantamount to saying that every school needs its own legal adviser – or indeed its own legal department. It is a remarkable reflection on the state of our law.

[25.109] For footnote 9 on p S54 substitute: *Leeds City Council v Price and others* [2005] EWCA Civ 289, [2005] 3 All ER 573.

Nature of the Convention rights (Code s 419)

[25.110] *Article 1 of Convention* (p S57) Article 1 of the Convention requires the contracting states to secure to everyone 'within their jurisdiction' the rights and freedoms defined in arts 2–18. The jurisdiction is essentially territorial; but exceptionally extends to outposts of a contracting state's authority abroad such as embassies, consulates and prisons. The jurisdiction does not apply to the total territory of another state which is not itself a party to the Convention, even if that territory is in the effective control of the first state. See *R (on the application of Al Skeini) v Secretary of State for Defence* [2004] EWHC 2911 (Admin), [2004] All ER (D) 197 (Dec), where it was held (at [293]) that the rules given in Code ss 106 and 128 did not prevent a finding of British jurisdiction in the case of a British prison in Iraq.

[25.111] Origins of Convention (p S58) In *R (on the application of W) v Metropolitan Police Commissioner (Secretary of State for the Home Department, interested party)* [2005] EWHC 1586 (Admin), [2005] 3 All ER 749 at [21], Brooke LJ said: 'It is often forgotten ... that English common lawyers contributed to the drafting of the Convention, and the resolution of points of statutory interpretation ... can very often be achieved without any need to refer to Strasbourg law at all.'

Compatible construction rule (Code s 421)

[25.112] *Subsection (1): Rule of construction* (p S61) The Human Rights Act 1998, s 3(1) does not apply where a person has been deprived of a Convention right (eg through negligence) where the enactment is Convention compliant if operated correctly: *R (on the application of Nunn) v First Secretary of State (Leeds City Council and another, interested parties)* [2005] EWCA Civ 101, [2005] 2 All ER 987 (applicant deprived through failure of planning authority to observe time limit). For another example see *R (on the application of H) v Secretary of State for Health* [2005] UKHL Civ 60, [2005] 4 All ER 1311.

[25.113] *Implied exceptions* Where a rule is laid down by statute, s 3(1) empowers the court to infer that an exception to the rule is implied where this is needed for compliance: *R (on the application of Hammond) v Secretary of State for the Home Department* [2004] EWHC 2753 (Admin), [2005] 4 All ER 1127 (Criminal Justice Act 2003, Sch 22, para 11: implied exception for oral hearings).

Illegality of incompatible acts and omissions of public authorities (Code s 432)

[25.114] *Vertical and horizontal effect* (p S78) A 'victim' who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by the Human Rights Act 1998 (the HRA), s 6(1) may bring legal proceedings against the authority, including judicial review (see Code s 434). However, this does not apply where the act in question is one by a court or tribunal. Here the HRA remedy must be sought through the exercise of the normal rights of appeal or judicial review etc (see Code s 435). This remedy against public authorities is referred to as the 'vertical' or direct effect of the HRA. This contrasts with a 'horizontal' or indirect effect, under which remedies could also be sought against private persons. In the debates on the Human Rights Bill, Lord Wilberforce said it was perfectly clear that the Bill was aimed entirely at public authorities and not at private individuals (HL Deb, 24 November 1997, col 781). However, it can be argued that since HRA, s 6(3)(a) expressly makes courts and tribunals 'public authorities' (see Code s 462), they are bound to apply the HRA in all types of legal proceeding before them. On horizontal effect, see further *Douglas v Hello Ltd (No 3)* [2005] EWCA Civ 596, [2005] 4 All ER 128 at [50].

Remedies for incompatible acts and omissions: damages (Code s 438)

[25.115] See *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240.

Article 3 of Convention (prohibition of torture) (Code s 441)

[25.116] Destitution (p S81) As to the duty of the state under art 3 in relation to asylum seekers, see *R (on the application of Limbuela) v Secretary of State for the Home Department*; *R (on the application of Tesema) v Secretary of State for the Home Department*; *R (on the application of Adam) v Secretary of State for the Home Department* [2004] EWCA Civ 540, [2005] 3 All ER 29.

[25.117] *Soering principle* The *Soering* principle, named after *Soering v United Kingdom* (1989) 11 EHRR 439, lays down that art 3 implies an obligation on the part of a contracting state not to expel from its territory a person who will face a real risk of being subjected in the receiving country to treatment which is contrary to art 3, even though the receiving country is outside its jurisdiction: see *R (on the application of B) v Secretary of State for the Foreign and Commonwealth Office* [2004] EWCA Civ 1344, [2005] All ER (D) 229 (Oct); *R (on the application of Bagdanavicius) v Secretary of State for the Home Department* [2005] UKHL 38, [2005] 4 All ER 263.

[25.118] *Medical etc conditions* Article 3 does not imply an obligation on the part of a contracting state not to expel from its territory persons who need ‘medical, social and other forms of assistance’: *N v Secretary of State for the Home Department* [2005] UKHL 31, [2005] 4 All ER 1017 at [15].

Article 5 of Convention (right to liberty and security) (Code s 443)

[25.119] *Article 5(4)* On the difference of wording between art 5(3) (‘shall be brought promptly before a judge ...’ and art 5(4) (‘shall be entitled to take proceedings’), see *R (on the application of H) v Secretary of State for Health* [2005] UKHL 60, [2005] 4 All ER 1311.

Article 6 of Convention (right to a fair trial) (Code s 444)

[25.120] *Damages for breach of art 6* See Code s 438 and *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240.

[25.121] *Article 6(1)(a)* (p S85) The requirement of a fair hearing is ‘a basic principle of the common law’: *R v Mushtaq* [2005] UKHL 25, [2005] 3 All ER 885 at [70]. ‘It is well known that among the rights implied into art 6(1) is a right against self-incrimination’ (at [49]). It is for the national court to lay down rules as to the admissibility of evidence (at [20]).

[25.122] *'In the determination of his civil rights'* Article 6 is concerned to protect procedural rather than substantive rights, so is not engaged in relation to rights to child maintenance secured by the Child Support Act 1991: *R (on the application of Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2005] 4 All ER 905.

[25.123] *'Criminal charge'* (p S86) As to a warning under the Crime and Disorder Act 1998, ss 65 and 66 regarding a putative offence, see *R (on the application of R) v Durham Constabulary* [2005] UKHL 21, [2005] 2 All ER 369.

[25.124] *'Independent and impartial tribunal established by law'* (p S86) A jury is not a separate tribunal from the trial court: *R v Mushtaq* [2005] UKHL 25, [2005] 3 All ER 885 at [19].

[25.125] An example of an official of the body whose decision is in issue (2005 Supplement p S86) is, in relation to a prisoner, a prison governor or other such official: see *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240 at [1].

[25.126] As to a judge de facto (2005 Supplement, p S86), see further *Baldock v Webster* [2005] EWCA Civ 1869, [2005] 3 All ER 655.

[25.127] *Article 6(3)(c)* (p S87) As to the immunity of advocates, see *Phillips v Symes* [2004] EWHC 2330 (Ch), [2005] 4 All ER 519 at [75]–[86].

Article 8 of Convention (right to respect for private and family life) (Code s 446)

[25.128] *Relation to art 10* There is a reference, in footnote 2 on p S90, to *Jameel v Wall Street Journal Europe SPRL* [2003] EWHC 2945 (QB), [2004] 2 All ER 92. This decision was approved in *Jameel and another v Wall Street Journal Europe SPRL* [2005] EWCA Civ 74, [2005] 4 All ER 356.

Article 10 of Convention (freedom of expression) (Code s 448)

[25.129] On p S93, at end of material dealing with Code s 448, insert:

Disclosure of information received in confidence See *A-G v Scotcher* [2005] UKHL 36, [2005] 3 All ER 1 (disclosure by member of jury).

Conditional fee agreements (CFAs) These are exempted by art 10(2): see *Campbell v MGN Ltd (No 2)* [2005] UKHL 61, [2005] 4 All ER 793, at [28].

Article 14 of Convention (prohibition of discrimination) (Code s 451)

[25.130] In *A v Secretary of State for the Home Department, X v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 3 All ER 169, it was held that the Anti-terrorism, Crime and Security

Act 2001, s 23, in providing for the detention of suspected international terrorists who were not UK nationals but not for detention of those who were such nationals, unlawfully discriminated in breach of art 14 against the enjoyment of liberty under art 5.

[25.131] In *R (on the application of Carson) v Secretary of State for Work and Pensions*, *R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2005] 4 All ER 545 the House of Lords criticised the four questions framed by Lord Woolf (see p S94) as to the application of art 14. In that case it was held that art 14 is not infringed by legislation which gives smaller social security benefits to people who live outside the UK, since the purpose of such benefits, including retirement pensions, is to provide a basic standard of living for its inhabitants. It was also held that art 14 is not infringed by legislation which gives smaller social security benefits to young people since their expenses are smaller.

Defined terms (Code s 462)

[25.132] ‘The Convention’ (p S102) In *A v Secretary of State for the Home Department*, *X v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 3 All ER 169 it was held that the Anti-terrorism, Crime and Security Act 2001, s 23, being discriminatory, could not strictly be required by art 15 of the Convention and so was disproportionate.

[25.133] ‘Public authority’ (p S104) A jury is not a separate public authority: *R v Mushtaq* [2005] UKHL 25, [2005] 3 All ER 885 at [19].

Succession

CHRISTOPHER SHERRIN, LL.M, PhD

Barrister, Professor of Law, University of Hong Kong

‘To be or not to be ...’

[26.1] One never ceases to be intrigued by the semantic gems to be discovered in the Law Reports. Peter Gibson LJ, in *Sherrington v Sherrington* [2005] EWCA Civ 326, [2005] All ER (D) 359 (Mar), recently mooted whether the word ‘attests’ in s 9 of the Wills Act 1837 (used in the phrase ‘attests and signs the will’) is properly construed as a transitive or intransitive verb in that phrase – now that is a poser for students of succession! The bright student will analyse the phrase as follows. The verb attests can be used as either a transitive verb, to witness something tangibly, or as an intransitive verb, to bear witness intangibly; the former requires a direct object, the latter merely circumstance. The word ‘signs’ in this context must be a transitive verb having ‘the will’ as a direct object but if the conjunctive ‘and’ gives the same transitive meaning to ‘attests’, the object must likewise be ‘the will’. But therein lies the problem, since it is axiomatic that witnesses to wills do not attest the will but attest the signature. On this basis it will be argued that the word ‘attests’ can only be a transitive verb if the object, ie the signature, is understood rather than expressed (which is a difficult construction in the context) – otherwise it must be an intransitive verb! Peter Gibson LJ inclined to the view that the intransitive use of the verb is correct, since it is not in dispute that the witnesses need not know that the document which they see the testator sign is a will (see *Smith v Smith* (1866) LR 1 P&D 143). The difficulty with this is that it tends to negate the principle that the witnesses attest the signature specifically, and to be consistent with that principle it can be argued that the verb needs to be construed as transitive, with the direct object of ‘the signature’ understood but not expressed. The matter is not simply academic, since it bears on the question as to what proof of the witnesses’ intention is required when they signed the will; granted they signed the document, is it necessary that they should sign with the intention of authenticating the document or the signature to the document and whether it is necessary that their intention should be directed to a document which they know is a will.

[26.2] The ultimate determination of the validity or otherwise of Sherrington’s will depended on an evaluation and analysis of the facts and evidence of the case and that need not be rehearsed here but the case raised two important and fundamental points on the law of wills which it is valuable to discuss. The first, as has been previewed above, centered on

the meaning of 'attests and signs' in s 9(d)(i) of the Wills Act 1837. Peter Gibson LJ thought that it was patently clear that 'attests' must be intended to add something to 'signs'; witnesses attest and sign, they do not simply sign. He referred to the celebrated judgment of Dr Lushington in *Hudson v Parker* (1844) 1 Rob Ecc 14, who gave as to the meaning of 'attest' to bear witness to a fact, and explained that the fact that the section states that 'no other form of attestation shall be necessary' did not negate the requirement that witnesses must attest but meant only that the outward work [sic] of attestation may be subscription only; a view the distinguished judge reiterated in *Bryan v White* (1850) 2 Rob Ecc 315. More recently the view has been expressed that attestation requires both the act of signing and the intention of attesting the testator's signature; see *In the Estate of Bercovitz (decd)* [1962] 1 All ER 552 and *Re Beadle (decd)*, *Mayes v Beadle* [1974] 1 All ER 493. So far so good. On this basis, although it is not necessary that the witnesses should know that the signature which they are attesting is to a will, it is essential that they should 'know what they are doing' – ie attesting a signature – and not, for example, merely signing a receipt or a letter. At first instance in *Sherrington* ([2004] EWHC 1613 (Ch), [2004] All ER (D) 203 (Jul)), Lightman J, found that, on the evidence, the intention to attest had not been proved since the witnesses had not been given any explanation as to the nature of the document or as to the purpose of their signatures.

[26.3] The proof of a subjective intention is notoriously difficult to prove by direct evidence, particularly when, as is often the case with wills, where the witnesses are dead or cannot be found. In such circumstances reliance can be placed on *omnia praesumuntur rite esse acta*, which can be conveniently found and explained by Lord Penzance in *Wright v Rogers* (1869) LR 1 P&D 678 at 682:

'The court ought to have in all cases the strongest evidence before it believes that a will, with a perfect attestation clause, signed by the testator, was not duly executed, otherwise the greatest uncertainty would prevail in the proving of wills. The presumption of law is largely in favour of the due execution of a will, and in that light a perfect attestation clause is a most important element of proof. Where both the witnesses, however, swear that the will was not duly executed, and there is no evidence the other way, there is no footing for the Court to affirm that the will was duly executed.'

[26.4] The presumption will certainly assist in establishing that which the attestation clause recites, namely the facts that the testator signed in the witnesses' presence and they signed in his presence. Peter Gibson LJ thought that the presumption could also assist to prove the intention of the witnesses to attest, so that, in the absence of the strongest evidence, the intention to attest can be inferred from the presence of the testator's signature on the will and the attestation clause and, underneath that clause, the signature of the witness. It was on the application of these principles to the facts of the *Sherrington* will that the Court of Appeal departed from Lightman J's conclusions. The testator, Sherrington, was a

successful solicitor and his will contained a short form of attestation clause, and the Court of Appeal concluded after an exhaustive re-evaluation of the facts, that, although the circumstances of the execution were rushed, the requisite act of, and intention to, attest had been sufficiently proved (if necessary with the assistance of the presumption) at the time of execution of the will.

[26.5] The second issue in the case was the proof of knowledge and approval. The law was not in dispute, being established by cases such as *Barry v Butlin* (1838) 2 Moo PCC 480; *Fulton v Andrew* (1875) LR 7 HL 448, [1874–80] All ER Rep 1240; and, more recently, in *Fuller v Strum* [2001] EWCA Civ 1879, [2002] 2 All ER 87 (see All ER Rev 2002, pp 354–356). A person propounding a document as the valid last will of the testator must establish that the testator did know and approve the contents at the time he executed it. But, in general, where the testator prepares his own will and there is a full attestation clause, knowledge and approval will be presumed in the propounder's favour. Certain situations, where the propounder of the will prepared the will and takes a benefit under it, excite the suspicion of the court, requiring evidence to dispel such suspicions and casting a positive burden of proof of knowledge and approval on the propounder. The accepted way of discharging this burden is by proof that the will was read over to the testator immediately before execution and that he affirmed his understanding and approval of it. In *Sherrington* Lightman J decided that the circumstances were such as to excite the suspicion of the court – although the will had been prepared by the testator himself and he was a solicitor, the propounder had played a part in the preparation of the will – so as to throw the burden of proof onto the propounder. The Court of Appeal agreed, but thought that the judge's finding of the want of knowledge and approval had to be assessed in the context of the facts of the case. After extensive review of these, the court was forced to conclude: '... in the absence of any clear or cogent evidence to the contrary, we think that it is nothing short of fanciful to conclude that the deceased did not know and approve of the contents of the will.'

[26.6] In so doing the Court of Appeal reluctantly took the unusual step of overruling the findings of fact of 'a Chancery judge of great experience' but thought it necessary to so do, holding that the judge's findings of fact had been plainly wrong and that it was their duty to interfere with his decision. The revocation of the grant of probate of the will was quashed and the will upheld even though (because of the exclusion of the deceased's three children from the will) an intestacy might seem to result in a fairer distribution.

[26.7] In contrast, a challenge to the due execution of a will (notwithstanding the presumption of due execution) succeeded in *Channon v Perkins (a firm)* [2005] EWHC 1510 (Ch), [2005] All ER (D) 132 (Mar), where the alleged 'witnesses' vehemently denied, having signed the will!

Capacity and knowledge and approval

[26.8] In addition to *Sherrington*, there have been a veritable plethora of cases where wills were challenged on the grounds of want of capacity and knowledge and approval, notably in *Hoff v Atherton* [2004] EWCA Civ 1554, [2004] All ER (D) 314 (Nov); *McClintock v Calderwood* [2005] All ER (D) 356 (Apr); *Allen v Emery* [2005] All ER (D) 175 (Oct); *Wyniczenko v Plucinska-Surowka* [2005] EWHC 2794 (Ch), [2005] All ER (D) 245 (Nov); and *Reynolds v Reynolds* [2005] EWHC 6, [2005] All ER (D) 70 (Jan). (See also *Fuller v Fuller* [2005] All ER (D) 120 (Feb); *Boycott v Mollekin* [2005] All ER (D) 433 (Jul) and *Shuck v Loveridge* [2005] EWHC 72 (Ch), [2005] All ER (D) 406 (Jan).)

[26.9] The time-honoured statement of the test of capacity to make a will laid down by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549, [1861–73] All ER Rep 47 is amongst the most enduring principles of the common law, never being bettered in judicial pronouncement, comprehensive yet succinct, it has precluding any need for statutory formulation. In common with all such paradigms of judicial jurisprudence it is trenchant, apposite and lyrical, so that once read it is readily assimilated and remembered, resulting in ubiquitous citation in all cases and commentaries on the law of testamentary capacity.

[26.10] Cockburn CJ's celebrated statement was cited and applied in *Hoff v Atherton*, where the judge analysed it in the context of the authorities cited by Cockburn CJ in his judgment. The grounds of dispute over the will were capacity and knowledge and approval. As Gibson LJ pointed out, the requirements of capacity and knowledge and approval are conceptually distinct and a finding of capacity is a prerequisite to a finding of knowledge and approval, but a testator may have capacity but not knowledge and approval. And, as stated above, the factual context of each may well be interrelated. Where the testatrix was at the time of executing her will in an advanced state of senile dementia, then cogent evidence will be needed of explanation to the testatrix of the meaning and effect of the words used. In the absence thereof, particularly if the will is lengthy and complex, the will will fail as in *Re Beaney (decd)* [1978] 2 All ER 595. But in the instant case the will was straightforward and the court thought no further explanation was needed to enable the testatrix to understand the will within the requirements of *Banks v Goodfellow*. *Fuller v Strum* [2001] EWCA Civ 1879, [2002] 2 All ER 87 was similarly cited and discussed, but it was thought that on the facts of this case the degree of suspicion was low and had been dispelled.

[26.11] *McClintock v Calderwood* provides a second example where Cockburn CJ's formulation was applied to a disputed will. The case also raised some of the discussion discussed above with reference to the *Sherrington* will, regarding proof of knowledge and approval, likewise citing *Fuller v Fuller* [2005] All ER (D) 120 (Feb) and, interestingly, the less well-known cases of *Ewing v Bennett* [2001] WTLR 249 and

Richards v Allan [2001] WTLR 1031. The dispute over Dr McClintock's will illustrated the often factual interrelation between capacity and knowledge and approval where, as in that case, a person has, or may have, impaired understanding and is dependent on others for his care. This is especially so when the person is physically under the control of others who have been instrumental in the making of the will and who benefit under the will. George Bompas QC (sitting as a deputy judge of the High Court) applied the relevant law and concluded on the facts of the case before him that, notwithstanding circumstances demanded enquiry, Dr McClintock did have the requisite capacity and knowledge and approval of his will at the time he executed it.

[26.12] In *Allen v Emery* Cockburn CJ's 'classic' formulation was cited and applied where Miss Sonia Proudman QC recommended the 'golden rule', to the effect that where a solicitor has any doubts about testamentary capacity, he should get a medical opinion. In addition to capacity – which it was held proved – knowledge and approval was raised in the context of the familiar authorities and the judge thought that the burden of proof had been discharged by the propounder. A plea of undue influence likewise failed.

[26.13] *Wyniczenko v Plucinska-Surowka* likewise called for a discussion and application of the familiar authorities of *Fuller v Strum* [2001] EWCA Civ 1879, [2002] 2 All ER 87; *Barry v Butlin* (1838) 2 Moo PCC 480; *Re Fuld (decd) (No 3)* [1965] 3 All ER 776; and *Wintle v Nye* [1959] 1 All ER 552. Judge Behrens thought it was a case where he was required to be 'vigilant and zealous' in examining the evidence in support of the will and ought not to pronounce unless the suspicion was removed and he was satisfied on a balance of probabilities that the paper propounded did express the true will of the testatrix. Not being so satisfied, he found against the will.

[26.14] Three issues were raised in *Reynolds v Reynolds*; first, did the testatrix have testamentary capacity at the time she made her second will; secondly, was that will validly executed or was her signature a forgery; and, thirdly, did she know and approve the contents of that will. The law governing these points was not in dispute and was rehearsed with reference to the familiar authorities which have been discussed above. The answers to the questions posed depended on a detailed analysis of the facts and evidence surrounding the execution of the will. Rimer J formulated the relevant test to be applied as follows:

'In my view, these circumstances arouse suspicion of a degree such as to cast on Ronald [the propounder] the burden of showing affirmatively that Isobel [the testatrix] knew and approved the contents of the 1999 will so as to satisfy the court that it truly represented her wishes. That does not, however, mean that nothing less than positive evidence of such knowledge and approval will do. If all the circumstances properly justify an inference that the testator did know and approve the contents of the disputed will, that will be sufficient to discharge the burden.'

A test cited with approval in the subsequent case of *Shuck v Loveridge* [2005] EWHC 72 (Ch), [2005] All ER (D) 406 (Jan). After an exhaustive such examination Rimer J concluded that the second will was not the testatrix's true last will, ordered revocation of the probate of that will and pronounced in favour of an earlier will which was not in dispute.

Domicile

[26.15] Domicile is a difficult legal concept, pervasive to all areas which raise issues of private international law. It is neither residence nor nationality, neither abode nor citizenship, but closer to the idea of 'home' than anything else. Domicile is relevant to the law of wills and intestacy governing jurisdiction and applicable law where foreign elements or property are involved and crucial to the application of the Inheritance (Provision for Family and Dependants) Act 1975, which is expressed to apply only to persons who die domiciled in England and Wales. This restriction is needed in the context of the UK since the discretionary system of family provision is clearly inappropriate to Scotland and Northern Ireland has its own similar corresponding Act. In *Cyganik v Agulian* [2005] EWHC 444 (Ch), [2005] All ER (D) 400 (Mar) the deceased's long-term cohabitant, who was disinherited under his will, wished to bring a claim against his estate, but could only do so if the deceased, who was a person of Cypriot origin, had acquired a domicile of choice in England so as to bring his estate within the jurisdiction of the 1975 Act. For many years the accepted authoritative statement of the law has been that of Scarman J in *Re Fuld's Estate (No 3)*, *Hartley v Fuld* [1965] 3 All ER 776 at 779, to which reference was made in the instant case, specifically to those principles which defined the acquisition of a domicile of choice: 'A domicile of choice is acquired when a man fixes voluntarily his sole or chief residence in a particular place with an intention of continuing to reside there for an unlimited time.' Applying those principles, it was held that the deceased's intention had been to reside in England and Wales permanently or indefinitely and thus he had died domiciled in England and Wales.

Distribution of the estate

[26.16] The case of *Mitchell v Halliwell* [2005] EWHC 937 (Ch), [2005] All ER (D) 210 (May) provides two salutary warnings to executors regarding the proper conduct of executors in the administration of the deceased's estate – all the more pointed in the case, since two of the executors were solicitors and two were accountants. The executors had commuted an annuity to a lump sum with the apparent consent of the deceased's children but the question was whether such consent had been an informed consent. It was held not, since the executors had not advised the children to seek independent legal advice as required by the Law Society's Guide to Professional Conduct of Solicitors. Nor did the court think this was an appropriate case for relief to be given to the executors

under s 61 of the Trustee Act 1925, because there was no real possibility of an argument being successfully advanced that the children gave informed consent to the commutation and payment (per Peter Lever QC sitting as a deputy judge of the High Court). The second issue was an application for the restoration of assets to the estate in respect of various pecuniary legacies which had been paid before the grant of probate. The law on this point is clear. An executor who is satisfied that there are more than sufficient assets in the estate to cover any possible liability may distribute some of the assets to beneficiaries before grant and before full payment has been made to creditors but the executor does so at the risk that if there should subsequently be a deficiency of assets, he will be personally liable for the value of the assets so distributed. In such circumstances the court will direct an account to be taken of the property possessed by the legatees with interest. Peter Leaver QC adopted the text of *Williams Mortimer & Sunnucks on Executors, Administrators & Probate* that: 'Even future liabilities of the estate, such as covenanted annuities must be provided for by suitable appropriation before any of the estate can properly be distributed: *Spode v Smith* (1827) 3 Russ 511'. The judge concluded:

'In my judgment, *Spode v Smith* makes it clear that distributions to beneficiaries should not be made from an estate unless it can be seen "with absolute certainty" that there will be a fund available that is equal to the amount of the debts of the Estate. In those circumstances, it seems to me that the Claimants are entitled to bring these proceedings for the restoration of the monies paid away to the specific legatees.'

Limitation, laches and estoppel

[26.17] *Re Loftus (decd)*, *Green v Gaul* [2005] EWHC 406 (Ch), [2005] 2 All ER 700 raised difficult questions on the application of the Limitation Act 1980 to actions for the removal of an administrator and an account of the administration of the estate. The administrator raised defences of limitation, laches and estoppel. The deceased died intestate on 11 August 1990; letters of administration were granted to the defendant on 10 December 1991 and proceedings were commenced on 20 January 2003. The dual questions arose; what was the correct limitation period, 12 years or six years; and when did it run from: the death (11 August 1990) (in which case the action would be time-barred); the grant of administration (10 December 1991); the end of the executor's year (10 December 1992) (in which cases the action would be time-barred if the period was six years but not if it was 12 years); or the completion of the administration, which had not yet been achieved. It is axiomatic that there is no limitation period; first, if the action is based on any fraud or fraudulent breach of trust to which the trustee was a party (s 21(1)(c)); or, secondly, to recover trust property or the proceeds of trust property in the possession of the trustee, or previously received by the trustee and converted to his own use (s 21(1)(b)).

[26.18] The first argument raised by the administrator was that, from the date of the assent in June 1992, she would have held the relevant property as trustee and not as personal representative. In which case the relevant limitation period would be six years under s 21(3) of the 1980 Act. Any claim would therefore have become statute-barred by June 1998.

[26.19] If the period was 12 years then in support of the date of death as the correct starting point, the administrator argued that the effect of *Re Diplock's Estate*, *Diplock v Wintle* [1948] 2 All ER 318; affd sub nom *Ministry of Health v Simpson* [1950] 2 All ER 1137 is that the 12-year period runs from the date of the death, even though a personal representative is not bound to distribute within a year from death. Time may run from a date before the claimant is entitled to sue: *Sevcon Ltd v Lucas CAV Ltd* [1986] 2 All ER 104 (cause of action for patent infringement accrued after application and prior to grant); *Hornsey Local Board v Monarch Investment Building Society* (1889) 24 QBD 1, [1886–90] All ER Rep 992 (time ran from imposition of local authority charge for paving expenses, even though not then apportioned as between property owners, because the local authority had a right to receive payment, even though it had no right to enforce). If time were not to start running until completion of the administration, it would follow that time had not yet started to run and that no cause of action had yet arisen. It was argued that this would be a bizarre result. Should it be found that no period of limitation applied (whether by reason of s 21(1) or otherwise), it was argued that the claim would be barred by laches. Even if s 21(1)(b) applied, laches may come into play: *Lewin on Trusts* (17th edn, 2000) p 1389 (para 44–14); *Re Sharpe*, *Re Bennett*, *Masonic and General Life Assurance Co v Sharpe* [1892] 1 Ch 154, [1891–4] All ER Rep Ext 1974; *Nelson v Rye* [1996] 2 All ER 186.

[26.20] The claimants countered by arguing that the claim was against the defendants as administrators and therefore was subject to the 12-year period in s 22. The administration of the deceased's estate remained incomplete and the claimants' rights to receive their shares or interests therein had not yet accrued: *Re Evans*, *Evans v Westcombe* [1999] 2 All ER 777 at 787 (a decision on s 21(3) by Mr Richard McCombe QC sitting as a deputy judge of the High Court). Accordingly, time had not yet started to run. If the law were that time began from the date of death (or from the end of the executor's year), beneficiaries in a complicated estate would lose their rights after 12 years unless they could rely upon s 21, which, it was argued, could not be right and *Re Diplock's Estate*, *Diplock v Wintle* is not authority for a contrary view. In any event, the action was commenced within 12 years from the end of the executor's year.

[26.21] Secondly, and alternatively, the claimants argued that the beneficiaries' inchoate right to have the intestate estate properly administered has been held to be a sufficient interest for the purposes of para 9 of Sch 1 to the 1980 Act (*Earnshaw v Hartley* [1999] All ER (D)

375), with the result that time does not run as between the beneficiaries in respect of the claim in so far as it relates to the disputed property.

[26.22] Thirdly, in the further alternative, the claimants' claim was in relation to trust property received and converted to the administrator's own use and was governed by s 21(1)(b). Accordingly, there was no applicable limitation period in any event. The claimants should be entitled to pursue the administrator in order to reconstitute the trust fund and it was argued that it mattered not whether that was by way of recovery of specific assets or in equity by the payment of equitable compensation in relation to the loss to the estate.

[26.23] Lawrence Collins J rejected the administrator's arguments and found in favour of the claimants. He ruled that the claim against her was as personal representative and so the relevant limitation period was the 12-year period in s 22(a):

'(a) no action in respect of any claim to the personal estate of a deceased person or to any share or interest in any such estate (whether under a will or on intestacy) shall be brought after the expiration of twelve years from the date on which the right to receive the share or interest accrued ...'

[26.24] On that basis, the limitation period would have expired on 10 August 2002, if the date of death was to be taken, but the action would be within the period if the date of the grant or the date of the end of the executor's year were taken. It was held that s 22(a) applied and the earliest possible date for the running of time was the end of the executor's year. Alternatively, if he were wrong on that and the relevant date was the date of death then Lawrence Collins J thought the case could fall within s 21(1)(b) for which there is no limitation period.

[26.25] On the substantive issues raised by the actions, the judge ordered the removal of the administrator under s 50 of the Administration of Estates Act 1925, taking into account the views of the beneficiaries and the interests of the estate as a whole, together with an account of all profits.

Taxation

JOHN TILEY, CBE, LL.D., MA, BCL

Professor of the Law of Taxation, University of Cambridge; Fellow, Queens' College, Cambridge

[27.1] 2005 has been an interesting year, with some striking decisions asserting or reasserting orthodoxy. It is not often in recent years that four out of five appeals in the House of Lords have gone the Revenue's way. It may be that the Law Lords, having spent much of their intellectual energy rejecting Revenue efforts to persuade them to create a judicial anti-avoidance doctrine, are keen to show that they are not some pro-taxpayer Mafia but can be trusted to reach realistic, sensible and balanced constructions of the legislation coming before them. We should have a good opportunity in the course of 2006 to see whether this is so when (or if) the Court of Appeal decision in *Jones v Garnett (Inspector of Taxes)* [2005] EWCA Civ 1553, [2005] All ER (D) 224 (Dec), allowing a taxpayer's appeal from a decision of Park J, reaches them (see at [27.3] below). Specific mention should also be made of a major case on corporate residence, *Wood v Holden (Inspector of Taxes)* [2005] EWHC 547 (Ch), [2005] STC 789 (at [27.52] below), in which Park J reversed the Special Commissioners; the Court of Appeal has since dismissed the Revenue's appeal ([2006] EWCA Civ 26, [2006] All ER (D) 190 (Jan)). These are exciting times.

[27.2] The only Revenue loss was *Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)* [2004] UKHL 51, [2005] 1 All ER 97, [2005] STC 1 and, by special dispensation, treated in All ER Rev 2004 at [27.5] ff. The first Revenue win was in the decision which was twin to *Barclays – IRC v Scottish Provident Institution* [2004] UKHL 52, [2005] 1 All ER 325, [2005] STC 15 (also discussed in All ER Rev 2004 at [27.5] ff). Here the Special Commissioners and the Inner House had decided in favour of the taxpayer ([2003] STC 1035) but the House of Lords reversed them on grounds which strain the distinction between points of law and points of fact (see All ER Rev 2004 at [27.13]) but which may in the alternative be seen as loosening the very strict idea coming from *Craven (Inspector of Taxes) v White* [1988] 3 All ER 495, [1988] STC 476 that steps are only pre-ordained if it was practically certain that one would follow the other. Other Revenue wins were *Autologic Holdings plc v IRC* [2005] UKHL 54, [2005] 4 All ER 1141, [2005] STC 1357 (at [27.10] below); *Macdonald (Inspector of Taxes) v Dextra Accessories Ltd* [2005] UKHL 47, [2005] 4 All ER 107, [2005] STC 1111 (at [27.33] below); and *West (Inspector of Taxes) v Trennery* [2005]

UKHL 5, [2005] 1 All ER 827, [2005] STC 214 (at [27.47] below). The year has also been remarkable for two decisions in favour of member states in cases before the ECJ (see [27.14] and [27.17] below). Readers may wish to know that the important ECJ case *Re Manninen* Case C-319/02 [2005] All ER (EC) 465, [2004] STC 1444, noted in the tax chapter for the 2004 Review, is discussed at greater length and for the benefit of the general reader at [12.39]–[12.45] above.

Settlements: spouses, businesses and share holdings

[27.3] It is hard to imagine an area of law in which the UK tax system and its administration seem to be in more of a mess than that in issue in *Jones v Garnett (Inspector of Taxes)* [2005] EWHC 849 (Ch), [2005] STC 1667. The case concerns TA 1988, s 660A (now ITTOIA, Pt 5, Ch 5 or s 619), under which income arising under a settlement is treated as income of the settlor and the exception in s 660A(6) / ITTOIA, s 626 for certain outright gifts of property between spouses (whether or not living together). Although ITTOIA, s 620 defines settlement as including, inter alia, dispositions and arrangements, it makes no mention of the case law gloss that the arrangement must contain an element of bounty if it is to come within these rules; this case involves sharp judicial disagreement as to the scope of bounty. The appeal began before a pair of Special Commissioners, who reached opposite conclusions so that the opinion of the senior, in favour of the Revenue, prevailed; their decision along with that of Park J is reported at [2005] STC 1667. Park J's decision, dismissing the taxpayer's appeal, is the subject of what follows in this Review. In December 2005 the Court of Appeal ([2005] EWCA Civ 1553, [2005] All ER (D) 224 (Dec)) reversed Park J in terms showing a very different view of the law and coming close to treating the rules as ones which should be contained as closely as possible. This will be covered in next year's Review – as may any further appeal to the House of Lords if given in time. The Court of Appeal noted that the exception in ITTOIA, s 626 was confined to spouses so that a quite different result might have been reached if the taxpayers had simply cohabited – so giving rise to issues of discrimination. Meanwhile, one may perhaps conclude more generally that the system under which the Revenue may choose a sacrificial family to bear the costs of litigation caused by their own views of the legislation is fundamentally unfair. It is odd that, while criminologists have spent much effort investigating the decision to prosecute, no analogous work has been done on the Revenue's decision to litigate.

[27.4] H, the taxpayer, was a skilled IT specialist who had been made redundant and now decided to set up in business on his own. H and W bought Arctic Systems, an off-the-shelf company. There were good commercial reasons for using a company rather than trading on his own account. The (two) shares were divided equally between H and W; H was the sole director and W was company secretary. H provided the company's technical and money-making skills as an IT consultant, while W provided

her extensive administrative skills. W was not made a director; she had no *right* to dividends and, as these were decided upon by H, she received them at his discretion. Each received a small salary with dividends in the £20,000+ range, enough to provide them with income to live off without incurring liability to higher rate income tax and using the tax credit accompanying the dividends to settle any liability on the dividends. The company paid corporation tax. The Revenue invoked TA 1988, s 660A on the basis that the structure was an arrangement (and so a settlement), that the property comprised in the settlement included the shares and so the dividend income received by her was to be treated as his instead.

[27.5] Over the years since 1990 such arrangements had become commonplace, partly as a result of the introduction of independent taxation of spouses in that year and partly because of later changes to the corporation tax structure designed to encourage entrepreneurs. The Revenue were of course perfectly entitled to try to run s 660A against such companies but for many years did nothing. Now they have invoked the section and used it to demand tax from the Jones family not only for one year but also, as allowed under TMA 1970, for six years altogether. In the meantime, the Revenue have, from the very best of motives, issued various statements of their views on the scope of these rules, the latest complete with 31 examples, 21 of which show the legislation applying and ten of which show it not applying (see guide published 18 November 2004 and summarised in *Simons Direct Tax Service*, C4.318–319). Advisers will now be studying how the decisions of the court tie in with this Revenue guidance – see, for example, on the High Court decision *M Truman Taxation*, 13 October 2005, p 29. The Special Commissioners accepted an argument for the taxpayer that the Revenue should meet the costs of the appeal since they had behaved ‘wholly unreasonably’ for part of the time (as from 20 August 2003).

[27.6] On the substantive points, the two Special Commissioners reached opposite conclusions, so the view of the senior prevailed; she decided in favour of the Revenue (SCD, para 57). Her junior colleague decided that there was an arrangement but that, as there was no element of ‘bounty’ about it, the arrangement did not fall within the meaning of the word ‘settlement’ (SCD, para 127); the fact that much seems to turn on the precisely when the bounty had to be present may make one think that the dissent is right. On Special Commissioners see M Robson [2005] BTR 15–21. However, Park J ([2005] EWHC 849 (Ch), [2005] STC 1667 at [33]–[36]) took a wide view of the term arrangement; for comment see G Loutzenhiser [2005] BTR 401 and J Wosner *Taxation*, 23 June 2005, p 320. Park J’s reasons are now set out in full – as they were to be in the Court of Appeal before being systematically rejected:

‘[34] I agree that there is a difference between a present intention to provide bounty and the actual provision of it later. But I do not accept that, if a structure is created with the intention that it shall be a means of providing bounty in future years, it is not an “arrangement” within the meaning of

s 660G(1). On the facts Mr and Mrs Jones were guided by advice of accountants when they acquired the company. The plan, for all that it may not have been cast in stone and that there could have been changes of mind about it, was that the company would pay to them salaries only at levels which would meet their basic needs, and that any profits would be distributed as dividends. (See the decision, para 18.) Mr Jones understood (and I have no doubt that Mrs Jones understood as well) that, if dividends were paid to Mrs Jones (and if the settlement provisions did not apply, no one having contemplated at the time that they might apply), the overall tax payable would be less than it would be if all the dividends were paid to Mr Jones.

[35] In my view the point of having one share acquired by Mrs Jones (or at least one of the points) was that she should in future be in a position to receive dividends which, if and when she did receive them, would plainly come to her as bounty. I do not accept Miss Powell's [the junior Special Commissioner] proposition that, if a structure is established by one person with an intention that bounty will or may flow from it to another person in future, there is not at the outset an arrangement which involves an element of bounty. The word "arrangement" carries to my mind the notion that it comprehends not just the specific things which happen when the arrangement is made, but also the reason or reasons why the arrangement is being made. If a structure is being established in circumstances where one of the reasons for it is that it will or will be available to be used as a means through which bounty will or may be channelled to another person in future, that is in my view fully within what the cases contemplate as an arrangement covered by the statutory definition.

[36] Miss Powell notes that, when Mrs Jones acquired her share, Mr Jones was not bound by a service contract to provide his services for only a low level of remuneration. Indeed, Mr Jones never did become contractually so bound. That is true, but in my judgment it is immaterial in this context. As I have said, parts of the plan or of the intention were that Mr Jones would draw a low salary and that dividends would be paid (half of them going to Mrs Jones on her share, which had cost her £1). Therefore in my view those elements of the plan or of the intention were parts of "the arrangement". They are not prevented from being parts of the arrangement by the feature that they were not legally binding. In many legal documents, whether statutes or private documents, one finds the two words "agreement or arrangement" appearing in conjunction with each other. Indeed, they so appear in the definition of "settlement", with which I am concerned. ("Settlement" includes any disposition, trust, covenant, *agreement*, *arrangement* or transfer of assets".) It is, I think, generally understood in instances where the words "agreement or arrangement" are used that "agreement" is likely to mean something which is legally binding, whereas "arrangement" is likely to mean, or at least to include, something which is planned and expected but is not legally binding. This is a further point which, in my judgment, is inconsistent with Miss Powell's proposition that an intention that a structure created now will be used to provide bounty in future is not enough to make it an "arrangement" within s 660G(1).'

The view rejected by Park J, and which was to find favour with the Court of Appeal, was that the only 'arrangement' was the acquisition of the

share by Mrs Jones; all the other elements were too uncertain. If the only arrangement was the share acquisition, it followed that one has to consider the question of 'bounty' only in relation to that acquisition; from this it followed that, as Mrs Jones gave substantial value for that share, there was no relevant element of bounty on her part. If one agrees with Park J as to scope of the arrangement, one still has to accept that the Revenue argument involves an extension of the concept of bounty to a situation in which two adults make a normal commercial transaction but provide consideration of unequal value. Whether that extension will commend itself to the House of Lords remains to be seen.

[27.7] This left the question whether the arrangement was excluded from s 660A as an outright gift of property between spouses within s 660A(6)/626, ie whether the gift carried a right to the whole of the income and was not substantially a right to income. Extending the decision of Vinelott J in *Young (Inspector of Taxes) v Pearce* [1996] STC 743 from preference shares to ordinary shares (see All ER Rev 1996, pp 452–453), the senior Commissioner had decided that the gift was substantially a gift of income (SCD, para 81) and so not an outright gift within the section. The junior Commissioner distinguished *Young v Pearce* (SCD, para 141), as this was an acquisition of ordinary shares without conditions. Park J, while agreeing with some hesitation with the views of the senior Commissioner, held more basically that there was no outright gift at all ([2005] STC 1667 at [44]).

[27.8] Perhaps for the benefit of taxpayers wondering how to complete their tax returns for the year 2004–05 by 31 January 2006, the Court of Appeal produced its decision with unusual haste. As already indicated, they took a much narrower view than Park J of the scope of the 'arrangement' and held that what is now ITTOIA, s 619 did not apply as the relevant arrangement as narrowed was not with that section. They were much less willing than Park J to find 'bounty' in such a commercial arrangement. They clearly did not agree with Park J that the case was 'a simple application of well-established principles'. They had great difficulty discerning a clear legislative policy in the provisions, not least in the rules confined to spouses. They did, however, agree with Park J that if the matter had fallen within ITTOIA, s 619 then it was not taken out by the exception in s 626. A sale at an undervalue can be a gift.

Other avoidance

[27.9] *Peterson v IRC* [2005] UKPC 5, [2005] STC 448 is a Privy Council decision in which the Committee, divided 3:2, declined to apply the New Zealand general anti-avoidance rule to strike down a capital allowance scheme. The case concerned non-recourse film financing in a scheme where there was also fraud by one of the companies – not the taxpayers. The Privy Council decided that the taxpayers were entitled to their capital allowances and were not caught by the GAAR. This was, to use the

accepted phraseology, tax mitigation not tax avoidance. However, the authority of the case is weakened in various ways. First, it is a decision by a bare majority and while the majority consists of Lord Millet, Lady Hale and Lord Brown, the minority consists of Lord Bingham and Lord Scott and one is left wondering how a differently constituted panel would have decided. Secondly, many will find the minority view very cogent, see especially at [91]. Thirdly, the majority stress the very unsatisfactory way in which the Revenue authorities had handled the appeal process and the way in which the matters for decisions had been defined (see at [21]–[28]). Fourthly, the majority go out of their way (at [48]–[52]) to suggest a way in which the Revenue might have won, before concluding (at [53]):

‘The Commissioner, however, has never put any such case forward, it is not supported by the necessary evidence or findings, and it is contrary to a concession made before the Board. It cannot be said to be unanswerable; and it is not open to their Lordships to adopt it.’

EC law

[27.10] First, the UK cases. 2005 includes a Revenue success in the House of Lords on a major procedural point: in *Autologic Holdings plc v IRC* [2005] UKHL 54, [2005] 4 All ER 1141, [2005] STC 1357 the House reversed the decision of the Court of Appeal in *Re Claimants under Loss Relief Group Litigation Order* [2004] EWCA Civ 680, [2004] 3 All ER 957, [2004] STC 1054 (see All ER Rev 2004 at [27.21]). This success was close run, since the House divided 3:2. The majority held that the taxpayers were not entitled to begin their action to recover tax in the High Court but must use the appeal process laid down in the TMA 1970, as amended. Lord Nicholls, after describing that process, said:

‘[12] Clearly the purpose intended to be achieved by this elaborate, long-established statutory scheme would be defeated if it were open to a taxpayer to leave undisturbed an assessment with which he is dissatisfied and adopt the expedient of applying to the High Court for a declaration of how much tax he owes and, if he has already paid the tax, an order for repayment of the amount he claims was wrongly assessed. In substance, although not in form, that would be an appeal against an assessment. In such a case the effect of the relief sought in the High Court, if granted, would be to negative an assessment otherwise than in accordance with the statutory code. Thus in such a case the High Court proceedings will be struck out as an abuse of the court’s process. The proceedings would be an abuse because the dispute presented to the court for decision would be a dispute Parliament has assigned for resolution exclusively to a specialist tribunal. The dissatisfied taxpayer should have recourse to the appeal procedure provided by Parliament. He should follow the statutory route.

[13] I question whether in this straightforward type of case the court has any real discretion to exercise. Rather, the conclusion that the proceedings are an abuse follows automatically once the court is satisfied the taxpayer’s court claim is an indirect way of seeking to achieve the same result as it would be

open to the taxpayer to achieve directly by appealing to the appeal Commissioners. The taxpayer must use the remedies provided by the tax legislation.’

On the EC aspect, which had so vexed the Court of Appeal, he was similarly straightforward. In para 17 he accepted that where UK tax law was inconsistent with directly enforceable Community law it must, where necessary, be disapplied or moulded to the extent needed to enable those requirements to be applied in a manner consistent with Community law. He accepted that if the residence restriction were found to be inconsistent with Community law the provision would need adapting so as to give effect to the overriding Community rights. In this regard the appeal Commissioners had the same powers and duties as the High Court. He distinguished *Hoechst UK Ltd v IRC* [2004] EWHC 1002 (Ch), [2004] STC 1486 (at [29]) on the basis that that case was not directed at a situation where, as here, the claimants’ claims had yet to be decided by the national court and there existed a statutorily prescribed route by which the claimants are able to obtain the tax relief they say is their entitlement under Community law. Which court or tribunal had jurisdiction to hear disputes involving rights derived from Community law was a matter for determination by each member state: see, for instance, *Dorsch Consult Ingenieuresellschaft mbH v Bundesbaugesellschaft Berlin mbH* Case C-54/96 [1998] All ER (EC) 262 at [40]. He accepted (at [31]) that the remedial route prescribed by the legal system of a member state must be such that the rules ‘are not less favourable than those governing similar domestic actions (principle of equivalence)’ and, additionally, the rules must not render ‘practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)’ (see the *Hoechst* case at [85]), but could not see that making the taxpayers follow the statutory route in the UK could give rise to such problems. For analysis, see H Foster *Tax Journal*, 8 August 2005, p 9.

[27.11] In *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v IRC* [2005] EWCA Civ 389, [2005] STC 687 the court dismissed the Revenue appeals from the decision of Park J ([2004] EWHC 2387 (Ch), [2004] STC 1178), holding that the restitution claim carried compound interest.

[27.12] *Deutsche Morgan Grenfell Group v IRC* [2005] EWCA Civ 78, [2005] 3 All ER 1025, [2005] STC 329 is another case primarily on limitation and restitution matters but also with a related civil procedure point. The Court of Appeal, allowing the Revenue appeal, held that a claim was statute-barred. The court then allowed the taxpayer appeal on another point, as to when the limitation period began to run. On this point many will find the dissenting judgment of Buxton LJ convincing. The case is clearly destined for the House of Lords. For discussion see [21.14]–[21.17], [21.33] above.

[27.13] We now turn to the ECJ decisions. In *Schilling v Finanzamt Nurnberg-Sud* Case C-209/01 [2005] STC 1756 the court used the free

movement of persons principle to give a tax deduction to officials working for the Commission (Mr and Mrs S). They were German nationals, resident and working in Luxembourg. They were exempt from both German and Luxembourg income tax on their income from the Commission (for details see para 30) but they had other income from Germany. They incurred expenses on a household assistant for themselves and their three children and sought to deduct these costs under German tax law. The German tax office refused to allow the deduction because compulsory social security contributions had been paid in Luxembourg and not in Germany. The court held that Mr and Mrs S were entitled to the benefit of art 39 and that this German rule broke art 39, since it would discourage people from working for the institutions of the EC (para 37). An attempted justification based on cohesion failed, the court applying the *Verkooijen* test of whether there was a direct link between the tax advantage and the offsetting fiscal levy (para 41).

[27.14] At the tail-end of the year we had *Schemp v Finanzamt Munchen V* Case C-403/03 [2005] STC 1792. A German national sought to deduct maintenance payments made to his former wife now resident in Austria. He would have been so entitled if she had still been resident in Germany or in any other country where the payment was subject to tax. The court first agreed with the taxpayer by holding that this was not a purely internal German tax law matter (para 25). However, they then held that there was no relevant discrimination under the EC Treaty, art 12 since the taxpayer's case rested on the wrong comparisons (para 35). They also dismissed the taxpayer's argument based on EC treaty art 18 on free movement of persons since the German rule did not interfere with *his* right to move (paras 44–46).

[27.15] *Re Lindman* Case C-42/02 [2005] STC 873 is a case on freedom to provide services. L, resident in Finland, bought a Swedish lottery ticket. Finnish tax law exempted lottery winnings if the lottery was based in Finland but taxed them if they arose abroad. This flagrant discrimination (Ct, para 21) could not be justified on the basis that those who ran the lottery had to pay tax (Ct, para 22). The opinion of the Advocate General on attempted justifications (paras 96–102) is of particular interest – and much fuller than the court's.

[27.16] In *de Lasteyrie v Ministère de l'Économie, des Finances et de l'Industrie* Case C-9/02 [2005] STC 1722 the court held that a tax charge levied by state X when L, an individual, migrated from X to state Y broke the treaty article on freedom of establishment. A tax charge was levied on the gain arising by reference to the market value of certain assets at the time of migration (French Tax Code, art 167a). Although the rule did not actually prevent a French taxpayer from exercising his right of establishment, it was of such a kind as to restrict the exercise of that right, having at the very least a dissuasive effect on taxpayers wishing to establish themselves in another member state (para 45). It was true that L

could have suspended the application of the exit charge by providing guarantees, but those guarantees were also of sufficient restrictive effect since they deprived L of the enjoyment of the assets given as a guarantee (paras 5–11 and 47). As to justification, the case sings familiar tunes: preventing the avoidance of tax is not of itself a sufficient justification and, in so far the risk of avoidance could be identified, the exit charge was far too wide and disproportionate a rule (at [49]–[53]). The UK rule of charging the tax if the migrant taxpayer returned to the UK within a certain period was more likely to succeed (at [54]).

[27.17] *D v Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen* Case C-376/03 [2005] STC 1211 is the long-awaited case in which the court, sitting as a Grand Chamber, has put to rest the anxieties of many tax administrations – and academics – about the right (or non-right) of a taxpayer resident in X to invoke the benefit of a treaty made between Y and Z on the ground that it is more advantageous and so discriminatory. The court held that EC law does not require ‘most-favoured nation’ treatment in a double tax treaty between state Y and state Z to be extended to those resident in state X, where X and one or both of the others are EC member states. In so doing the court reasserted the principle in *Gilly v Directeur des Services Fiscaux du Bas-Rhin* Case C-336/96 [1998] All ER (EC) 826, [1998] STC 1014 (All ER Rev 1998, pp 470–472) and put *Cie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* Case C-307/97 [2000] STC 854 (All ER Rev 2000, pp 384–385) in its proper perspective. These anxieties might have been avoided if in those cases the court had been more precise in its language, something for which it is not renowned. This issue was one of two before the court. P J Wattel [2005] BTR 578 criticises the court, arguing that it is odd for a state to be allowed to make such distinctions bilaterally when they are not allowed to make them unilaterally. Others, while agreeing with Wattel that consistency is not the hallmark of the court, will still feel that international tax structures should be left alone at this stage of the EC’s development.

[27.18] The case concerns wealth tax and the freedom of movement of capital. D was resident in Germany but held some assets in the Netherlands. Germany no longer had a wealth tax but the Netherlands did. On the relevant date, 10% of his wealth consisted of real property situated in the Netherlands, the remainder being in Germany. Residents in the Netherlands, who were taxed on their worldwide assets, were entitled to certain allowances; non-residents were taxed only on their assets situated in the Netherlands and were not entitled to the allowance. D sought the allowance. The court first held that the Dutch position rejecting the claim was soundly based by analogy with the income tax cases such as *Finanzamt Köln-Altstadt v Schumacker* Case C-279/93 [1995] All ER (EC) 319, [1995] STC 306. Residents and non-residents were objectively different and this was not a case where 90% of his assets were

held in the Netherlands (para 41). On this point reader should note that the court overruled the Advocate General – for criticism of the court's position and support for the Advocate General see P J Wattel [2005] BTR 578 at 579 ff.

[27.19] D's second argument was that if he had been resident in Belgium instead of Germany he would have been able to use the allowance thanks to the Belgium-Netherlands treaty. The court noted that no unifying or harmonising measure for the elimination of double taxation had yet been adopted at Community level and that member states had not yet concluded any multilateral convention to that effect under art 293 EC. The court then noted that member states are at liberty, in the framework of those conventions, to determine the connecting factors for the purposes of allocating powers of taxation (see *Cie de Saint-Gobain, Zweigniederlassung Deutschland v Finanzamt Aachen-Innenstadt* Case C-307/97 [2000] STC 854 at [56]). The court has also accepted that a difference in treatment between nationals of the two contracting states that results from that allocation cannot constitute discrimination contrary to art 39 EC (see *Gilly* at [30]).

[27.20] The court then cited *Saint Gobain* at [58] to show that once a treaty has been signed the member must treat the permanent establishment of a non-resident company in the same way as a resident company. That was, however, quite different from the present case. D was not seeking to compare his position with that of someone in the Netherlands but with someone resident in Belgium and so able to use the detailed rules in the Belgium-Netherlands treaty.

'The fact that those reciprocal rights and obligations apply only to persons resident in one of the two contracting member states is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands.' (para 61)

Here too the Advocate General would have reached a different conclusion.

[27.21] *Ministre des Finances v Weidert* Case C-242/03 [2005] STC 1241 is a short and relatively straightforward case on free movement of capital. The taxpayers, a married couple resident in Luxembourg, had subscribed for 200 shares in a Belgian company. If they had acquired shares for cash in fully taxable capital companies resident in Luxembourg, they would have been entitled to a relief from Luxembourg income tax. The court held that the relief was discriminatory and so the taxpayers were entitled to the benefit of the relief. The effect of the Luxembourg rules was to discourage Luxembourg nationals from investing their capital in companies established in another member state; the provision also constituted an obstacle to a Belgian company seeking to the raise of capital in another member state (at [14]).

[27.22] The court spent much time considering an argument based on cohesion – that the tax advantage to the investor was offset by the liability of the investor to full Luxembourg income tax on the dividends. This was to be contrasted with the fact that a dividend from a Belgian company accruing to a Luxembourg resident would, under the relevant double tax treaty, be taxed at 15% in Belgium before being taxed in Luxembourg. The court dismissed this argument – the relief for the investments was not tied to the dividend income and so the direct link test in *Verkooijen* was not met (at [22]). In any case, there was evidence that the benefit from the relief would far outweigh any tax on the dividends (at [23]).

[27.23] The court also held (at [25]) that the double tax treaty between Luxembourg and Belgium shifted fiscal cohesion to the level of the reciprocity of the rules applicable in the contracting states (citing *Wielockx v Inspecteur der Directe Belastingen* Case C-80/94 [1995] All ER (EC) 769, [1995] STC 876 at [24]; and *X v Riksskatteverke* Case C-436/00 [2004] STC 1271 at [53]).

Human rights

See also *Murat v IRC* at [27.64] below

[27.24] In *Barnes (Inspector of Taxes) v Hilton Main Construction Ltd* [2005] EWHC 1355 (Ch), [2005] STC 1532 the General Commissioners had allowed the taxpayer's appeal against the Revenue's refusal of a certificate under the scheme for sub-contractors in the construction industry. The Revenue appealed and, it was agreed, would succeed if a previous decision of Ferris J on the construction of the section were still correct. In *Shaw (Inspector of Taxes) v Vicky Construction Ltd* [2002] EWHC 2659 (Ch), [2002] STC 1544 (see All ER Rev 2002 at [26.95]), Ferris J had held that past failures of the taxpayers in the conduct of their tax affairs were more than 'minor and technical' they were not entitled to a certificate, however good their future behaviour might promise to be.

[27.25] Before Lewison J the company argued that it was now, ie since the Human Rights Act 1998 had come into force, open to the court to depart from that decision since a refusal of the certificate would have consequences that were disproportionate. It also argued that the decision of Lightman J (*Hudson (Inspector of Taxes) v JDC Services Ltd* [2004] EWHC 602 (Ch), [2004] STC 834), was not binding as the human rights aspect had not been considered in that case. Lewison J took account of the decision of Ferris J, who had held that the scheme was 'convention-compliant'. Lewison J was prepared to assume that the right to be paid gross was a possession within the meaning of art 1 of the First Protocol (at [14]). He also held (at [15]) that the possession had been interfered with – rejecting a Revenue argument that would have meant that a law imposing a statutory overlay on an area economic activity could never be challenged. However, he then held that the scheme was reasonable (at [20]) and so the company's right had not been infringed. It

followed that there was no proper basis for the General Commissioners' conclusion based on proportionality. This left the question of what the court should do. Lewison J simply quashed the certificate leaving it to the taxpayer to decide whether or not apply again. He did not address the question whether such an application would be out of time.

[27.26] *PM v United Kingdom* App No 6638/03 [2005] STC 1566 is a case of some importance and explains why the recent reforms of the tax system have been driven by fear of the discrimination jurisprudence coming from Strasbourg. Today there is no longer a right to deduct maintenance payments for a child (unless the payer was over 65 in 2000). Before 2000, TA 1988, s 347B(1) gave such a right, but only if the payer was married to the mother. The present claim related to 1997–98 and so had to be taken direct to Strasbourg rather than through the UK courts. The ECHR ruled that s 347(1)(b) interfered with the taxpayer's right to enjoy his possession under art 1 and did so in a way which was discriminatory – the government had not provided an objectively justifiable basis for the difference (at [28]). The court awarded damages equal to the loss of the benefit of the deduction (at [38]). One should note also that the court held that there was no violation of art 13 of the Convention (at [34]). The case appears to turn on the taxpayer's role as parent – not as spouse; this makes it unclear whether the Strasbourg court will take a wider view for example where the rule giving an exemption from inheritance tax for spouses (but not cohabitants) is considered. The court did recognise that some discrimination between married and unmarried is justifiable even with regard to parents, for example, *McMichael v United Kingdom* [1995] 2 FCR 718 at [98] (UK rule refusing automatic parenthood to unmarried fathers upheld).

[27.27] *King v United Kingdom (No 3)* App No 13881/02 [2005] STC 438 is, one assumes, the final stage in the saga the previous act of which ended in 2004 ([2004] STC 911; All ER Rev 2004 at [27.22]), where the ECHR had declared part of the complaint admissible. The case concerned penalty proceedings which had begun with a *Hansard* warning in November 1987 and ended in 2001: see *King v Walden (Inspector of Taxes)* [2001] STC 822 and the subsequent refusal by the Court of Appeal for leave to appeal. Did the period of 13 years 10 months and 12 days amount to a breach of his right to have the penalty proceedings heard within a reasonable time? The court concluded that although the applicant was responsible for much of the delay, the authorities were responsible for three periods totalling some three and a half years. The court rejected a claim for pecuniary damage on the basis that the applicant had not shown any causal connection between the delay and the loss claimed. The court also dismissed the claim for 10,000 Euros for non-pecuniary damage, holding that as the applicant had been responsible for so much of the delay, a finding of violation was sufficient. Finally, the court awarded him costs of 7,300 Euros for the Strasbourg case and 10,200 Euros for the domestic proceedings, these being a small fraction of

those he had claimed. Perhaps the important point decided in this saga was that the period within which it was reasonable to settle the penalties began at the *Hansard* stage – ie long before the actual liability to tax was determined.

[27.28] We do not usually cover VAT cases in this chapter but *Khan v Customs and Excise Comrs* [2005] EWHC 653 (Ch), [2005] STC 1271 is worth a mention. Hart J held that the fair trial article, art 6, did not require that the accused had to be represented by a lawyer; the individual could choose to represent himself. The central question for the tribunal would be whether it was or should have been manifest to, or brought to the attention of, the tribunal that K's interests were not being effectively represented before it. In this case, nothing had occurred which should have alerted the tribunal to a need to interfere with K's choice. Hart J cited *Kamasinski v Austria* App No 9783/82 (1989) 13 EHRR 36.

Employment

[27.29] In *Wilson (Inspector of Taxes) v Clayton* [2004] EWCA Civ 1657, [2005] STC 157 the Court of Appeal dismissed the Revenue's appeal from the decision of Patten J ([2004] EWHC 898 (Ch), [2004] STC 1022; All ER Rev 2004 at [27.25]). They agreed with Patten J that the payment was caught neither by the general definition of earnings (now ITEPA, s 62) nor by what is now Pt 3, Ch 10 (ex TA 1988, s 154). The case concerned a sum of £5,060 awarded an employer by the Employment Appeal Tribunal as compensation for withdrawing a particular benefit (a car allowance). What seems to have worried the Revenue was that the tribunal also ordered them to be reinstated and the effect of the relevant legislation was that the employer was obliged to treat the employee in all respects as if he had not been dismissed. So, they argued, the payment was referable to the taxpayer's continued employment.

[27.30] Peter Gibson LJ dismissed this emphatically – the legislation directed the employer to treat the reinstated employee in all respects as if he had not been dismissed (at [32]). It did not have the effect of overriding the actual facts relating to a payment when the court was considering for tax purposes whether a payment in the hands of the employee should be taxed. The fact was that the payment in the instant case was made pursuant to a consent order compromising proceedings based on a quite justified claim of unfair dismissal. He also held that the fact that the tribunal did not have jurisdiction to make the particular order was irrelevant as the agreement was embodied in a consent order (at [39]).

[27.31] The argument on Chapter 10/ex s 154 also failed. *Mairs (Inspector of Taxes) v Haughey* [1993] 3 All ER 801, [1993] STC 569 had established that the section did not charge receipts from fair bargains. Where, as here, parties at arm's length arrived at a genuine compromise in settlement of hostile litigation, it would be an extremely difficult task to unpick the constituent parts of the bargain and to put a value on those

parts. This did not mean that s 154 could never apply, since it might be possible to find a wish to confer a gratuitous benefit within the agreement; that was not shown here (at [50]). He added (at [51]) that he would not go so far as Patten J had done in the High Court (at [27]) when he said that nothing short of showing that the payment was purely gratuitous would suffice.

[27.32] In *Ibe v McNally* [2005] EWHC 1551 (Ch), [2005] STC 1426 the taxpayer-appellant (I) appeared in person. On 24 September 2001 her employer company had told her that she was being made redundant with immediate effect. This had been followed by a letter of 9 October. If the effect was that she had been summarily dismissed, as in *Wilson v Clayton*, the payments would not be taxable, being below the figure of £30,000 in ITEPA, s 404 (TA 1988, s 148); this was effect A. If, however, she was being given three months' notice, so terminating her employment on 23 December 2001 but placing her meanwhile on what is commonly called 'garden leave', the payments would be taxable as ordinary emoluments from her employment – effect B. The Special Commissioner analysed the letter and the other facts (such as the terms of employment) and concluded that B was the right answer. Her appeal failed. The answer seems inevitable on the facts but indicates how very slight changes of company procedure can produce quite different fiscal consequences. This 'rewards' the lucky or the well informed.

Schedule D Case I: ITTOIA Part 2 trading profits

[27.33] In *Macdonald (Inspector of Taxes) v Dextra Accessories Ltd* [2005] UKHL 47, [2005] 4 All ER 107, [2005] STC 1111 the House of Lords dismissed the taxpayer companies' appeal – unanimously. Lord Hoffmann, giving the only reasoned speech, agreed 'largely' with the reasoning of Jonathan Parker LJ (at [18]). On the Court of Appeal decision, see All ER Rev 2004 at [27.27]. The case concerned FA 1989, s 43, which barred the employer's deduction under Schedule D Case I for 'relevant emoluments', unless paid within nine months of the end of the accounting period. Section 43 defined relevant emoluments as 'those allocated either in respect of particular offices or employments (or both) or generally in respect of offices or employments (or both)'. Section 43(11) extended the rule to 'potential emoluments' ie 'amounts or benefits ... held ... with a view to their becoming relevant emoluments'. The employers had paid the sums in issue to a discretionary trust, the objects of the trust being present and future employees of the company and others, for example, dependants. Were the sums 'potential emoluments'? Lord Hoffmann said they were because there was a realistic possibility that they would be so paid.

[27.34] There is interest in a point made at [20]–[21]. The lower courts had been worried by the anomaly that unless the funds are at some point applied in the payment of relevant emoluments, they might never be

deductible at all. Lord Hoffmann noted that precisely that result had been achieved by FA 2003, s 143 and Sch 24, which replaced s 43(1)(a) shortly after (and possibly in response to) the decision of the Special Commissioners:

‘The anomaly and unfairness has therefore not troubled a more recent Parliament and may not have troubled the Parliament of 1989. As Jonathan Parker LJ observed, it is the result of an arrangement into which the taxpayers have chosen to enter. Any untoward consequences can be avoided by segregating the funds held on trust to pay emoluments from funds held to benefit employees in other ways ... [T]here would be other anomalies in the construction favoured by the Special Commissioners and the judge. By setting up a trust such as this, the taxpayer could achieve immediate deductibility of payments into the trust and postpone indefinitely the liability of employees to tax on the emoluments for which, in part, the money was eventually applied. That would enable the purpose of s 43 to be easily frustrated.’

In last year’s Review (All ER Rev 2004 at [27.28]) it was suggested, wrongly as it turns out, that some members of the House of Lords might have some difficulty with the Revenue argument. So perhaps this too may be seen as part of the new realism in the House of Lords.

[27.35] *Small (Inspector of Taxes) v Mars (UK) Ltd* [2005] EWHC 553 (Ch), [2005] STC 958 is a thoroughly unsatisfactory decision by Lightman J in a test case on the correct accounting practice to be applied when dealing with trading stock on hand at the end of the year and the relationship between that and TA 1988, s 74 (1)(f) (now, but only for income tax, ITTOIA, s 33). Section 74(1)(f) prevents the deduction of any sum employed or intended to be employed as capital in the trade. The *Mars* case itself related to the year ending in 1996. The figure at issue in the *Mars* case was just over £3m. Lightman J allowed the Revenue appeal. After reviewing the case and the decision of the Commissioners, he began (at [26]) by saying that the first issue, to be decided by reference to current accountancy practice was whether the relevant figure was the cost of the stock or its value (at [27]) that, under the relevant SSAP, the relevant sums should simply be carried forward rather than having a notional sale.

[27.36] Lightman J then turned to the relationship between s 74 and accounting practice, treating the point as a relatively short one (at [37]). The prohibition in s 74 was general and overrode any established accountancy principle governing the treatment of depreciation. The capitalisation of the £3m sum as an item of cost in the figure for stock did not alter the character of the figure as depreciation or disapply s 74(1)(f). Thus far he was in agreement with the Commissioners. However, they had gone on to hold that that it was in accordance with generally accepted accountancy practice to take the £3m into account. Lightman J held (a) that this was not supported by the evidence and (b) that in any event it could not override s 74. They had also suggested that that the figure of gross depreciation of £41m needed to be adjusted by an offset of the £3m

to avoid that capital amount becoming chargeable to corporation tax on that income in the period which they described as 'a result for which there is no statutory authority'. Lightman J did not accept the suggested adjustment. By adding the £3m capital depreciation to the closing stock, Mars had by its own choice turned it into income: it became an income receipt just by being part of the closing stock value.

[27.37] As Maurice Parry Wingfield has correctly pointed out (*Tax Journal*, 25 April 2005, p 9), it is very hard to see how this hangs together. He finishes: 'My problem with Lightman J's judgment is not just that I think it is wrong but that he failed adequately to explain the grounds on which he based it. Put crudely, I don't understand how he reached his conclusion.' So other puzzled readers should take heart; see also *Tax Journal*, 16 May 2005, p 2 and M Truman *Taxation*, 30 June 2005, p 344.

[27.38] The *Mars* case has a Scottish sibling: *William Grant & Sons Distillers Ltd v Revenue and Customs Comrs* [2005] SWTI 16147. This was dealt with in the same appeal hearing before the Special Commissioners but, as a Scottish case, has gone on appeal to the Scottish Court of Session, where a divided court gave lengthy judgments. The case concerned the tax year ending in 2002 and so required the court to consider the effect of FA 1998, s 42 now, but only for income tax, ITTOIA, s 25. For critical comment on the Court of Session majority decision, see T Ambrose *Tax Journal*, 3 October 2005, p 7 and M Truman *Taxation*, 27 October 2005, p 83. The overall position is that the two Commissioners and one Scottish judge have decided for the taxpayers while two Scottish judges and one English judge have decided in favour of the Revenue. This case too seems destined for the House of Lords.

Capital allowances

[27.39] *IRC v Anchor International Ltd* [2005] STC 411 is a good Scottish case on the familiar – and much litigated – boundary between plant and setting but this time doing so by reference to the statutory guidance in CAA 2001, Pt 2, Ch 3 (ss 20–25). The case is unusual in that the Revenue lost. The taxpayer provided leisure facilities and 70% of its income came from providing five-a-side football pitches. The pitches consisted of a synthetic grass carpet, lasting between five and nine years, lying on foundations consisting of a stone base. The taxpayer sought an allowance for the carpet as plant. The Revenue argued that the carpet and foundations should be treated as one unit and so as a structure; this argument failed before the Special Commissioner. The Inner House dismissed the Revenue's appeal (at [26]). This made it strictly unnecessary to consider whether the pitch and the base constituted a fixed structure within the meaning of s 22 but the court agreed with the Special Commissioner that they did not (at [27]). They then agreed with the Commissioner that money spent on relaying the pitch including the

works underneath were spent on plant; the works underneath constituted the alteration of land for the purpose of installing plant, s 25 (see end of para [31]).

Capital gains

[27.40] *Weston v Garnett* [2005] EWCA Civ 742, [2005] STC 1134 is a nice case on the nature of a particular loan. Having examined the terms of the loan note and the underlying loan, the court was in no doubt that this amounted to a loan to enable the holder of certain notes loan to convert their loan notes into shares. Hence they were not corporate bonds within TCGA 1992, s 117 and so could not be qualifying corporate bonds within s 115(1)(a). This absence of doubt had been shared by Moses J in the High Court ([2004] EWHC 1607 (Ch), [2005] STC 617) and by the Special Commissioners.

[27.41] *O'Sullivan v Revenue and Customs Comr* [2005] EWHC 2130 (Ch), [2005] STC 1712 decides a short point on taper relief under TCGA 1992, s 2A(8). Lawrence Collins J, dismissing the taxpayer's appeal, held, inevitably, that taper relief applied only as from 5 April 1998. The taxpayers 'fair' reading, that taper relief applied as from the date the asset was acquired (1989) and so would have enabled the taxpayer to claim both indexation relief and taper relief in respect of the same period, was rejected. The case illustrates very nicely the practical difference between indexation relief, which applies to the acquisition cost (here £1), and taper relief, which applies to the gain (here the net proceeds of sale exceeded £1.2m).

[27.42] In *Robson v Mitchell (Inspector of Taxes)* [2005] EWCA Civ 585, [2005] STC 893 the Court of Appeal dismissed the taxpayer's appeal from the decision of Patten J ([2004] EWHC 1596 (Ch), [2004] STC 1544). The point is a short one on the scope of a qualifying loan to a trader for the purposes of TCGA 1992, s 253. In order to obtain relief under that provision the taxpayer, T, must show that the money lent by T is used wholly for the purposes of the trade of the borrower, B. T was the sole director and shareholder of B. The loan in question (L2) was a new loan, refinancing loan 1 (L1). T argued that both the General Commissioners and Patten J had been wrong to look at the use to which L1 had been put rather than that for L2. Neuberger LJ agreed with the Commissioners and with Patten J, pointing out that otherwise a company which had incurred borrowings for a non-qualifying purpose could bring that borrowing within the ambit of s 253 by simply rescheduling its debt (at [23]). He left open (at [34]) an interesting question of construction, whether the absence of the word 'exclusively' meant that a loan spent for mixed qualifying and non qualifying purposes could be allowed under s 253. Such an argument would fail on the facts anyway (at [39]).

[27.43] *Davies (Inspector of Taxes) v Hicks* [2005] EWHC 847 (Ch), [2005] STC 850 is a more intricate but no less interesting case in which

Park J dismissed a Revenue appeal from the Special Commissioners. The case concerns the scope and function of TCGA 1992, s 106A, added in 1998 to deal with bed and breakfast transactions; Park J declined to give it a wide effect. The case involves a scheme to defer liability to CGT otherwise arising to H. The scheme is outlined by Park J (at [13]): (a) H set up a discretionary trust with UK resident trustees this having no CGT effects; (b) H transferred 100,000 shares to them so qualifying for holdover relief with the trustees taking over the assets at H's low base cost; (c) the UK resident trustees sold the shares on the open market, this being the bed part of the bed and breakfast transaction; (d) later the same day there was a change of trustees with trustees resident only in Mauritius replacing the UK trustees – so causing a deemed disposal and reacquisition at market value of the settled property under TCGA 1992, s 80; any gain realised by the Mauritius trustees would be exempt from UK CGT by reason of the UK/Mauritius Double tax agreement; (e) the Mauritius trustees completed the bed and breakfast transaction by getting UK brokers to buy as many shares as they could with the proceeds – they bought 99,100; finally (f), three months or so later, the Mauritius trustee sold the shares on the open market. The relevant transactions were genuine (at [15]).

[27.44] The case turns on the analysis of the facts at step (d). The Revenue asserted that the trust property should be taken at that time to be shares. In fact, of course, the property comprised whatever rights the trustees had vis-à-vis the brokers handling the sale which would be either money (but sterling is not an asset) (s 22(1)(b)) or, more likely, a debt and so an exempt asset in the hands of the original creditor (s 251). The Revenue argument was based on the effect of TCGA 1992, s 106A; not only would it remove the chargeable gain which had initially accrued on 99,100 of the shares sold by the UK resident trustees but it had the further effect, not anticipated by the planners of the scheme, that, although the trust fund at the time of the change of residence of the trustees actually consisted of a sum of cash or of a debt owed by stockbrokers, it had to be regarded as consisting of 99,100 shares with a low base value.

[27.45] Park J declined to give s 106A this wide effect. As he said (at [20]–[22]), s 106A was a computational section triggered by a disposal of securities. The purpose of the section was to lay down rules as to how the chargeable gain or allowable loss on that disposal was to be computed. When that computation had been made, the purpose of the section was fulfilled. The section could only apply if there was a disposal of securities. The section might apply to deemed disposals, but there was no relevant deeming provision in the section itself: a deemed disposal had to be one provided for by some other provision. Further, for s 106A to apply, the subject matter of the actual or deemed disposal had to be securities, which included shares. When there was a disposal of shares, the shares disposed of would be matched with shares acquired in accordance with

the rules in s 106A and computed accordingly. When that process was completed the application of s 106A to that particular disposal would be at an end. He referred (at [26]), to a number of cases in which the court had considered the effect of such deeming provisions:

‘But however far a deeming provision may go, I cannot accept in this case that a provision which was intended to identify which shares acquired by a particular taxpayer should be matched with shares sold by the same taxpayer can be deemed to have had effects going far beyond that and requiring it to be imagined, for a quite different statutory purpose, that the assets held by the taxpayer at a different time did not consist of the actual assets then held by him, but rather consisted of different assets altogether.’

[27.46] Finally, he referred (at [28]) to an argument based on taper relief, whether, if the Revenue argument were correct, H would have been entitled to taper relief for the period when he did not in fact hold the shares. He concluded:

‘There may or may not be a minor anomaly in the operation of taper relief, but whether that is so is a singularly abstruse question. I think it unlikely that the point crossed the draftsman’s mind, and in any case only very small amounts could depend on it. There is nothing in the taper relief provisions which persuades me that the true effect of s 106A(5)(a) was to cause the settled property under the settlement at the time of the change from United Kingdom resident trustees to a Mauritius resident trustee to have to be treated as if it was something which in fact it was not.’

Trusts and CGT

[27.47] In *West (Inspector of Taxes) v Trennery* [2005] UKHL 5, [2005] 1 All ER 827, [2005] STC 214, the House of Lords reversed the Court of Appeal and held that gains were chargeable at the settlor’s marginal rate of 40% – and not the then trust rate of 25% – because they were caught by TCGA 1992, s 77 (on lower courts see All ER Rev 2003 at [27.50] ff). The decision caused some surprise, since the broad approach adopted sits oddly with the approach previously taken by the House in cases such as *Ingram v IRC* [1999] 1 All ER 297, [1999] STC 37 (All ER Rev 1999, p 482). The explanation for the difference is that *Ingram* concerned a fundamental principle of IHT planning, whereas *Trennery* concerns a particular anti-avoidance provision. Alternatively, the *Trennery* case is another example of the new realism of the House of Lords

[27.48] The five steps, which were known as a ‘flip flop’ scheme, are set out by Lord Robert Walker (at [30]), who helpfully also explains the fiscal chemistry involved. In brief, T and other taxpayers, whom we shall ignore, held shares in an unquoted company. A sale to an outside body was anticipated and so T entered into a scheme under which he hoped to reduce his potential CGT liability from 40% to 25%.

(1) On 1 April T made what the report calls a life interest settlement (the first settlement) with himself and his spouse as trustees. The

property (£10) was transferred to the trustees who held for the settlor for life but with various powers including one to transfer all the property to another trust for the beneficiaries.

- (2) On 4 April T transferred shares in E Ltd to the trustees of the first settlement. This did not give rise to an immediate charge to CGT, as the shares qualified for holdover relief for business assets under TCGA, s 165. As T had a life interest this trust fell squarely within s 77.
- (3) Also on 4 April T executed a further deed creating the second settlement; the trustees of the second settlements were professional trustees. As his Lordship put it, this 'set the stage' for what was to happen.
- (4) On 4 April Mr and Mrs T, as trustees of the first settlement, make a highly geared borrowing of £770,000 on the security of the shares. This was not a disposal, since it was a mortgage (TCGA, s 26). The actual process involved solicitors holding the certificates but this is not important. The relevant amounts of cash were transferred from the first trust to the second – this involved no disposal of assets.
- (5) On 5 April the first settlement trustees executed deeds irrevocably excluding the relevant taxpayer (the life tenant of each first settlement) and his or her spouse from benefit under those settlements.
- (6) Shortly thereafter, in the tax year 1995–96, the shares were sold by the trustees of the first settlements.

Although facts (1)–(5) were 'preordained', there was no argument based on the *Ramsay* principle; the question was simply one of the construction of s 77.

[27.49] The Revenue invoked s 77, which applied the settlor's 40% rate if the settlors had an interest, ie if (a) any property which might at any time be comprised in the settlement, or (b) any derived property was, or would, or might become, payable to or applicable for the benefit of the settlor or his spouse in any circumstances whatsoever, or (c) the settlor or his spouse enjoyed a benefit deriving directly or indirectly from any property which was comprised in the settlement or any derived property. Section 77(8) said that 'derived property' in relation to any property, meant income from that property or any other property directly or indirectly representing proceeds of, or of income from, that property or income therefrom.

[27.50] The following passages from Lord Robert Walker's speech make the points with admirable clarity:

'[38] Mr Green's primary submission was that in this definition the words "income from" (where they first occur) govern all the following phrases. He advanced this argument in the Court of Appeal, although it had not been advanced before the Special Commissioners, and indeed a different analysis had apparently been conceded (see para 17 of the Special Commissioners'

decision and para [49] of the judgment of Jonathan Parker LJ). I agree with the Court of Appeal in rejecting it, for the reasons which they gave. The only natural reading of sub-s (8) is that its structure has five elements: that “derived property” in relation to any property (P), means:

- (i) income from P;
- (ii) any other property directly or indirectly representing proceeds of P;
- (iii) income from any such other property at (ii), above;
- (iv) any other property directly or indirectly representing proceeds of income from P; and
- (v) income from such other property at (iv), above.

[39] The taxpayers’ next main point is that if s 77 is to apply through any of these five elements the property or income in question must, in the relevant year of assessment, be comprised in the chargeable settlement. Any other interpretation would, it is said, give s 77 an almost unrestricted reach, leading to extraordinary results and possible hardship to taxpayers.

[40] Mr Green developed this argument with great skill, but to my mind it faces an insuperable objection. If he is right, the whole elaborate definition in sub-s (8) could have been replaced by a simple reference to any capital or income of the property comprised in the chargeable settlement. Section 77(2)(a) and (b) already refer to property comprised in the settlement, before the reader ever gets to derived property. So the taxpayers’ contention deprives the latter expression of any force. But Parliament must be taken to have intended the expression to add something to the effect of s 77, and it would occasion no great surprise if the addition were found to be a category of property which is settled property, and is derived from settled property comprised in the chargeable settlement, but is not itself still comprised in the chargeable settlement ...

[42] In my opinion the £770,000 started off as derived property (and was also, for a matter of hours or minutes, property comprised in the first settlement). It continued to be derived property after it was appointed out of the first settlement. The effect of the taxpayers’ argument would be to cut off the operation of the “derived property” provision at the very moment when it started to have some work to do. The economic effect of the arrangements was to transfer about three-quarters of the value of the shares to the second settlement, but without any disposal of the shares for CGT purposes. Mr Trennery was a beneficiary under the second settlement, and continued to be a beneficiary in 1995–1996. Both on the natural meaning of s 77(2) and (8) and in normal parlance, Mr Trennery was in 1995–1996 beneficially interested in property derived from (that is, representing proceeds of) the shares which remained in the first settlement. The only property in the second settlement which was not “derived property” was the second nominal sum of £10 which Mr Trennery settled on 4 April 1995.’

[27.51] The decision of Mann J in *Burrell v Burrell* [2005] EWHC 245 (Ch), [2005] STC 569 is a reassertion of established case law, notably *Re Hastings-Bass* [1974] 2 All ER 193, [1974] STC 211, allowing trustees to set aside a transaction, here a deed of appointment, for failure to understand the fiscal consequences of their acts. This stems from the trustees’ duty to consider the legal and fiscal consequences of their acts. Mann J declined an invitation from counsel of the trustees to examine an

issue arising from the decision of Lightman J in *Re Barr's Settlement Trusts, Abacus Trust Co (Isle of Man) v Barr* [2003] EWHC 114 (Ch), [2003] 1 All ER 763 that there had to be some default on the part of the trustees or their agents. Lightman J held that there was such a default anyway. There is also a fine point on the extent of the invalidity, Lightman J rejecting an 'all or nothing' approach and so allowing the trustees to set the deed aside in part.

International

[27.52] The decision of Park J in *Wood v Holden (Inspector of Taxes)* [2005] EWHC 547 (Ch), [2005] STC 789 has a good claim to be one of the leading cases of the year. It involves points of law on the residence of a corporation, an issue without much recent high level case law in the UK. Reading that judgment one senses that Park J was very cross with what he perceived as the shortcomings of the two Special Commissioners who had decided the case. Park J's decision has been upheld by the Court of Appeal ([2006] EWCA Civ 26, [2006] All ER (D) 190 (Jan)).

[27.53] The case involved a complex scheme to do with the disposal of shares in a company called CIL, registered and incorporated in the British Virgin Islands, but in the end everything hinged on the residence of E, a dormant Dutch incorporated company. The Commissioners held that E was resident in the UK, because its central management and control were here. In addition they held that it was 'effectively managed' here and so was resident in the UK under the test in the tie-breaker test in the UK/Netherlands Double Tax Treaty, art 4(3): FA 1994, s 249. Park J rejected both conclusions.

[27.54] On the first point, which he conveniently called the common law of corporate residence, Park J concluded that, on a proper application of the law to the facts, the only tenable conclusion was that E was resident in the Netherlands. In that the Commissioners had reached a different conclusion they had either applied the wrong test, or if they applied the right test, had come to a conclusion which could not properly be reached. At this level therefore the case turns on a close analysis of the facts. There is also some interest in the question of the burden of proof.

[27.55] The managing director of E was a trust resident in Geneva, the AA Trust. Park J said that there was no evidence to show that E was controlled by any entity other than AA. E held the shares in CIL for a time and disposed of them. These were not immaterial legal formalities. It was true that AA took those decisions on the recommendation of accountants in Manchester. The accountants devised the scheme, superintended the carrying out of it, and advised the participants about the steps which it was appropriate for them to take if the scheme was to proceed. They expected the parties to accept the advice and to carry out the steps, but no reputable professional adviser would accept that this meant that it was the adviser who took the decisions. There was a

difference (at [25]) between being able to influence those in control (Park J's view of the role of those in the UK) and actually exercising control. Although E's role was limited one, that did not mean that one could disregard established law:

'Such companies are sometimes referred to as vehicle companies or SPVs (special purpose vehicles). "Vehicle" has a belittling sound to it, but such companies exist. They can and do fulfil important functions within international groups, and they are principals, not mere nominees or agents, in whatever roles they are established to undertake. They usually have board meetings in the jurisdictions in which they are believed to be resident, but the meetings may not be frequent or lengthy. The reason why not is that in many cases the things which such companies do, though important, tend not to involve much positive outward activity. So the companies do not need frequent and lengthy board meetings.'

[27.56] Perhaps Park J was wondering whether schemes that he had helped to choreograph in the course of his career could, on this argument, be treated as done by him. He went out of his way to confine *Unit Construction Co Ltd v Bullock (Inspector of Taxes)* [1959] 3 All ER 831 (at [23]):

'[23] *Unit Construction v Bullock* is a very important case, but it is also in my view a highly exceptional case in terms of the result. It was not a case where the local boards still exercised central management and control, but did so under guidance and influence from the parent company in the United Kingdom. It was a case in which the local boards stood aside altogether, and the parent company effectively usurped what in theory were the functions of the local boards.'

[27.57] This left the question of the burden of proof. Park J placed some weight on the point that the Revenue had accepted that E was resident in the Netherlands until being awoken from its dormant state on being purchased by CIL as part of the scheme. Thus (at [44]):

'For all that on a tax appeal s 50(6) of the Taxes Management Act 1970 places the burden on the taxpayer of showing that the assessment overcharges him, undisputed features of the facts must surely be capable in appropriate circumstances of placing an evidential burden on the Revenue to demonstrate why something like the residence of a company has changed. I agree with Mr Goldberg that, it being admitted on all sides that until 18 July 1996 [E] was resident in the Netherlands, it was incumbent on the Revenue to produce at least some material to show a change of residence. In my judgment the Revenue produced none.'

[27.58] Park J also overruled the Commissioners on the application of FA 1994, s 249, holding that the effect of the UK/Netherlands Double Tax Treaty, art 4(3) was to treat E as resident in the Netherlands for treaty purposes and so as not resident here, thanks to s 249. The Commissioners seem to have equated the treaty concept of effective management with the common law test of central management and control. Park J emphatically repudiated this (see esp at [78] and [79]). The point of evidence mentioned

by the Commissioners did not support their conclusion. He added that here, too, he did not think that it is satisfactory in this case for the Commissioners simply to rest their decision on the burden of proof and s 50(6) of TMA 1970. But that is what they had done.

[27.59] Broadly, the Court of Appeal found the analysis by Park J 'compelling' (eg para [35]). They referred to the cases discussed by David Oliver in his article in (1996) *British Tax Review* 505–541 some of which Park J also considered. The clarity of the opinions expressed so far makes an appeal to the Lords less likely.

[27.60] The writer's present view is that the taxpayer's case is stronger under s 249 than under the common law test but that, as either will suffice to get the taxpayer home, the taxpayer will win. The exploration of the common law test will still be of major importance to companies unable to take advantage of s 249, for example, all those resident in tax havens with which the UK has no double tax agreements with a tie-breaker clause. Meanwhile, companies and their directors still have to ensure that they carry out the relevant amount of activity in the right place.

[27.61] The decision of the Court of Appeal in *Agassi v Robinson (Inspector of Taxes)* [2004] EWCA Civ 1518, [2005] STC 303, reversing Lightman J in on the application of TA 1988, ss 555 and 556 and the associated regulations, was noted last year (see All ER Rev 2004 at [27.68]). See J Hedley *Taxation*, 10 February 2005, p 446.

Inheritance tax

[27.62] *St Barbe Green v IRC* [2005] EWHC 14 (Ch), [2005] STC 288 involved a short problem on the deduction of liabilities. At first sight – and again on second sight – the decision reached by the court seems inevitable, but it is still useful to have the point settled. D, the deceased, was entitled to a life interest in certain settled property so that under IHTA 1984, s 49 the capital of the settled property formed part of her estate. The value of her free estate was negative, as she had many debts. Mann J, adopting an argument not put forward by the Revenue, held that her executors could not deduct the negative balance of the free estate from the value of the settled property. This was because the value to be brought in under s 49 was the net value of the settled property. Section 5(1) directed that free estate should be brought in net of liabilities but could not be turned into a negative sum. The purpose of s 5(3) was to introduce qualifications to that principle and not to provide an additional rule of deductibility. The second and alternative reason was the argument put forward by the Revenue. Although the 1984 Act did not state precisely how liabilities were to be taken into account, it was obvious that they had to be deducted from something. As a matter of principle it made sense that they were deducted from something which was capable of bearing them. This was in line with the position under the estate duty case of *Re*

Barnes [1938] 4 All ER 870 which was considered at length. The wording under the estate duty legislation had been much clearer: FA 1984, s 7.

Procedure and administration and miscellaneous

[27.63] *McEwan v Martin (Inspector of Taxes)* [2005] EWHC 714 (Ch), [2005] STC 993 is a case involving a finding of negligence for the purposes of TMA 1970, s 36(1). It involved a claim for rollover relief, the Revenue arguing, successfully, that the claim for rollover relief, which had been agreed with the inspector, should be reopened either because it was simply the wrong sort of expenditure, or because some of it appeared to have been incurred outside the three-year period within which it had to be incurred if the relief was to be obtained. The Commissioners had found that the expenditure did not qualify and that there had been negligence. Park J agreed and held that these were largely matters of fact for the Commissioners anyway.

[27.64] *Murat v IRC* [2004] EWHC 3123 (Admin), [2005] STC 184 is the sort of case tax lawyers reserve for after-dinner speeches. The taxpayer was issued with a notice under TMA 1970, s 19A requiring him to produce certain document, including a balance sheet. He argued that, as he did not have the figures, he could not produce a balance sheet and he should not be made to produce incorrect figures and so incriminate himself. He also argued that filling in a balance sheet infringed his rights under art 3, prohibiting torture or inhuman or degrading treatment or punishment. As Moses J said (at [19]–[20]):

‘... I am most concerned to learn that Mr Murat has suffered as a result of stress and lost clients, indeed proposes to sell his business. This is all most unfortunate and, for the reasons I gave at the outset of my judgment, I would hope he would use his skills and undoubted talents to better effect. But this is miles away from art 3. Those who genuinely do suffer from torture or inhuman or degrading treatment or punishment will be horrified to see such an important protection diminished in this way. I am sure Mr Murat would agree.

[20] The next submission was the requirement to make him fill in the balance sheet violated art 4, prohibition of slavery and enforced labour. Leaving aside as I do for the purpose of this argument whether it is even open to him to advance such an argument following the decision of Dr Brice, again there can be no question of any enforced or compulsory labour. It is true that in *Van der Mussele v Belgium* (1983) 6 EHRR 163, the court regarded the expression “forced or compulsory labour” as including all work or service exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. But art 4 does not apply to any work which a citizen is required to perform in pursuance of his civic obligations.’

[27.65] *Haven Healthcare (Southern) Ltd v York (Inspector of Taxes)* [2005] EWHC 2212 (Ch), [2005] STC 1662 is an interesting case showing some deficiencies in our appellate system. The case was an application by

the Revenue to the High Court to strike out an appeal from a body of general Commissioners. The Commissioners heard the case on 30 July and gave their determination on that date but gave their reasons on 2 August. The taxpayer asked the Commissioners for a case stated on 30 August. Under the relevant regulations the case had to be asked for within 30 days of the final determination of the proceedings made by the tribunal. Lightman J held that the 30 days began on 30 July, not 2 August, and so the Revenue's application succeeded. A different result would have been reached if the appeal had been to the Special Commissioners, as the regulations governing that body imposed a duty to give reasons. The taxpayer's case may have been weak on the facts (at [6]), but the distinction between the two sets of Commissioners is unfortunate and not at all obvious to those without the relevant learning. Because of the absolute nature of Lightman J's ruling, there seems to be little hope of flexibility in a case of real injustice.

[27.66] *R (on the application of Hitch) v Special Comrs* [2005] EWHC 291 (Admin), [2005] STC 474 decides a point which is a happy rarity and held that the Presiding Special Commissioner has power to nominate a second Commissioner to replace a Commissioner who has died. When the litigation – *Hitch v Stone (Inspector of Taxes)* [2001] EWCA Civ 63, [2001] STC 214 (All ER Rev 2001 at [28.24] ff) – was last before the courts, the Court of Appeal remitted the case to the Special Commissioners to determine the case in the light of the Court of Appeal's decision that the transaction was a sham. Evans Lombe J, construing the relevant tax legislation, said that as the Presiding Special Commissioner undoubtedly had the power to order a case to be continued by a new Commissioner to replace one who has become incapacitated, there was no reason why he should not simply replace one of two. He had already held that the position at common law was that one judge, including therefore a Special Commissioner, could replace another half-way through a trial; however, it might often be necessary to start again, especially if witnesses are involved (at [15]).

Tailpieces: the judicial role in construction

[27.67] The words of Mummery LJ in *Lonsdale v Braisby (Inspector of Taxes)* [2005] EWCA (Civ) 709, [2005] STC 1049 provide a suitable end to this survey. The Court of Appeal dismissed the taxpayer's appeal from the decision of Lewison J (see All ER Rev 2004 at [27.50]) on a short technical point on the interaction of relief for contributions for the old retirement annuity contracts and the newer personal pension schemes (anyone needing more information should consult P Bates *Taxation*, 21 July 2005, p 421). The taxpayer appellant criticised Lewison J for not setting out the facts or the contentions of the parties sufficiently. As Mummery LJ observed (at [50], [54]):

[50] The criticism is irrelevant to the issue whether the General Commissioners erred in law. The taxpayer may make the same criticism of

this judgment, which I have attempted to keep short and to the point. The only point of law is whether the taxpayer or the Revenue's construction of s 655(1) is the correct construction ...

[54] The consequences of the Revenue's construction of s 655(1) may seem unfair to the taxpayer and the taxpayer's construction may be fairer and more beneficial to individual taxpayers in her position. Those are not, however, valid reasons for departing from the natural and ordinary meaning of the legislation. Perceived unfairness in fiscal legislation is a matter to be referred for the consideration of legislators. It is not a matter for judges, whose function is to interpret and apply the legislation. The aim of the relevant provisions is reasonably clear. The language and scheme of the legislation is consistent with the Revenue's construction.'

Tort

ALASTAIR MULLIS, LLB, LLM

Dean and Professor in Law, University of East Anglia

DONAL NOLAN, MA, BCL

Fellow and Tutor in Law, Worcester College, Oxford

Negligence

[28.1] 2005 was a relatively quiet year as far as negligence was concerned, and there were only four reported decisions on the duty of care issue. Two of these were handed down by the House of Lords, but even here the general significance of the rulings is somewhat limited. The first of the two House of Lords decisions was *D v East Berkshire Community Health Care NHS Trust* [2005] UKHL 23, [2005] 2 All ER 443 (see also [18.42]–[18.57] above). In each of the three appeals before the House, doctors had suspected abuse of a child by a parent, and alerted the relevant authorities. Further investigation revealed that their suspicions were in fact unfounded, but by this time both the children and the parents in question claimed to have suffered psychiatric injury as a result. Negligence claims were brought against the hospital trusts and (in one case) the doctor personally, and the question of whether the defendants had owed duties of care to the children and their parents arose as a preliminary issue of law. The Court of Appeal ([2003] EWCA Civ 1151, [2003] 4 All ER 796) held that, since recent Strasbourg jurisprudence held out the possibility of a claim under the Human Rights Act 1998, it was no longer legitimate to rule as a matter of law that no common law duty of care was owed to the children in these circumstances, but that there were cogent reasons of public policy (arising out of the potential conflict between the interests of the child and those of the parents) for denying a negligence claim to the parents. The Court of Appeal's decision that a duty might be owed to the children was not challenged by the defendants, but the parents asked the House of Lords to overturn the ruling that no duty of care had been owed to them. The House refused to do so (Lord Bingham dissenting).

[28.2] Lord Nicholls agreed (at [82]) with the court below that local authorities could owe common law duties to children in the exercise of their child protection functions: the law had moved on since the decision to the contrary in *X and others (minors) v Bedfordshire County Council* [1995] 3 All ER 353 (see also per Lord Bingham at [30], per Lord Brown at [124]). The position of the parent suspected of abuse was very different, however. In essence, the appellants were claiming that health professionals responsible for protecting a child owed a person suspected of having

committed a crime against that child a duty to take reasonable care in investigating their suspicions. This was a ‘surprising proposition’, said Lord Nicholls (at [77]), for when it came to the reporting and investigation of suspected crime, the balancing point between the public interest and the interest of a suspect had long been the presence or absence of good faith. He gave as examples the qualified privilege which attaches to reports to the authorities on such matters, the element of malice required in the torts of malicious falsehood and malicious prosecution, and the requirement of bad faith or recklessness in the cause of action for misfeasance in public office. What about a more restricted proposition, to the effect that a duty was owed only to *parents* suspected of abuse? At first blush, it would seem odd that a doctor would owe a duty to a parent but not to a childminder or teacher, but such a distinction could perhaps be justified by reference to the resultant disruption of the parent’s family life. The crucial question, therefore, was whether the potential disruption of family life tilted the balance in favour of imposing a duty of care towards the parent. Lord Nicholls concluded (at [85]) that it did not, principally because such a duty would lead to a potentially damaging conflict of interest:

‘A doctor is obliged to act in the best interests of his patient. In these cases the child is his patient. The doctor is charged with the protection of the child, not with the protection of the parent. The best interests of a child and his parent normally march hand-in-hand. But when considering whether something does not feel “quite right”, a doctor must be able to act single-mindedly in the interests of the child. He ought not to have at the back of his mind an awareness that if his doubts about intentional injury or sexual abuse prove unfounded he may be exposed to claims by a distressed parent.’

[28.3] It followed that the appropriate level of protection for a parent suspected of abuse was that clinical and other investigations must be conducted in good faith. Lord Rodger agreed that a duty of care owed to the parents would of its very nature ‘cut across the duty of care to the children’ (at [110]), and concluded that it would not therefore be fair, just and reasonable to impose such a duty. Unlike Lord Nicholls, he could see no proper basis for refusing to extend a duty owed to the parents to other categories of suspected abuser, and such a broad duty was, he thought, even more likely to compromise the central duty owed to the child. Lord Brown also agreed that a duty of care owed to parents would give rise to a potentially damaging conflict of interest, citing statements from experts in the field to the effect that such a duty might cause doctors to take ‘the line of least resistance’ and ignore subtle indications of possible abuse. Furthermore, the majority pointed out that the same conclusion had been reached by the High Court of Australia in *Sullivan v Moody* [2001] 2 LRC 251, and by the Privy Council in *B v A-G of New Zealand* [2003] UKPC 61, [2003] 4 All ER 833, and that an analogy could be drawn with *A v Essex CC* [2003] EWCA Civ 1848, [2003] All ER (D) 321

(Dec), where the Court of Appeal held that a duty of care was not owed by an adoption agency to prospective adopters, since it might conflict with the agency's duty to the prospective adoptee.

[28.4] Lord Bingham dissented, first and foremost because he did not accept the force of the conflict of interest argument. This was because the duties owed to the child and the parent coincided. The duty owed to the child would be breached if a doctor overlooked signs of abuse which a careful examination would identify, but this would also be a breach of any duty owed to a normal parent, and it would make no difference if the parent were the abuser, since the duty served the lawful and not the criminal interests of the parent. And if, on the other hand, a diagnosis of abuse was made which was not justified by the evidence, then this would not only be a breach of the duty owed to the parent, but also a breach of the duty owed to the child. Secondly, Lord Bingham was persuaded by the appellants' argument that domestic case law, Strasbourg jurisprudence and ministerial guidance all encouraged a general practice which, in most cases, envisaged co-operative partnership between healthcare professionals and parents in the interests of the child. Furthermore, although there would be occasions when emergency action would have to be taken without informing the parents, in general healthcare professionals should 'have close regard to the interests of parents as people with, in the ordinary way, the closest concern for the welfare of their children' (at [44]). Finally, his Lordship pointed out that the claims by the parents would not be dismissed out of hand in either France or Germany (although French law did require proof of 'gross fault' in such a situation).

[28.5] Three further points should be noted. The first is that Lord Nicholls indicated that there might be exceptions to the general no-duty rule in cases where the relationship between the parent and the doctor was not confined to the fact that the parent's child was the doctor's patient. He also made clear, however, that the general rule would not be displaced simply because the parent initiated the recourse to medical advice, or took the child to the doctor. The second point is that two of their Lordships commented on the suggestion (made in academic writings) that in recent case law on the liability of public authorities there has been a shift of emphasis from the duty to the breach stage of the negligence inquiry. Lord Bingham remarked (at [49]) that if such a shift had taken place, then he would welcome it, since the duty concept had 'proved itself a somewhat blunt instrument for dividing claims which ought reasonably to lead to recovery from claims which ought not'; Lord Nicholls, on the other hand, said that while the idea of jettisoning the duty of care concept, and instead tracing 'the contours of liability' by the use of a 'modulated' standard of care, was an approach that was not without attraction, he considered it more appropriate to the field of human rights than the law of negligence (at [92]–[94]). Finally, a couple of comments were made on another 'live' issue at the moment, the

relationship between common law liability in negligence and the remedy that may be available under the Human Rights Act to a claimant whose Convention rights have been violated. Two very different positions can be taken on this issue. One is that since a breach of the claimant's Convention rights entitles her to a direct remedy under the Act in any case, there is no need to develop the law of tort so as to give her redress at common law; the other is that it would reflect badly on the law of tort if it did not provide a remedy to such a claimant, thereby forcing her to rely on her direct claim under the Act instead. In *D v East Berkshire*, Lord Bingham inclined more towards the latter view: it was preferable, he said, for the law of tort to 'evolve, analogically and incrementally, so as to fashion appropriate remedies to contemporary problems' than for it to 'remain essentially static, making only such changes as are forced upon it, and leaving difficult, and, in human terms, very important problems to be swept up by the Convention' (at [50]). By contrast, Lord Rodger (at [118]) wished to reserve his opinion on the matter in the light of the apparently conflicting messages sent out by *Wainwright v Home Office* [2003] UKHL 53, [2003] 4 All ER 969 at [34] (where Lord Hoffmann apparently endorsed the former of the two approaches) and *R (on the application of Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14, [2005] 2 All ER 240 (where the House of Lords seemed to undermine the former approach by indicating that the remedy under the Act might well be much less generous than the remedy at common law).

[28.6] The other House of Lords case on duty was *Brooks v Metropolitan Police Comr* [2005] UKHL 24, [2005] 2 All ER 489. This time the issue was whether the police owe a duty of care to a victim or a witness of a crime with whom they come into contact. The claimant, Duwayne Brooks, had been present at the scene of the racist murder of his friend Stephen Lawrence, and had himself been abused and attacked by the gang of white youths who committed the murder. He alleged that the police had mishandled the subsequent investigation, and that, as a key witness and victim of the attack, he had not been treated by the police as he should have been. He brought an action against the defendant Commissioner and various named officers in which he sought damages for personal injury, on the grounds that the behaviour of the police had exacerbated or aggravated the post-traumatic stress disorder he suffered as a result of the attack itself. In so far as the claim rested on negligence, the judge at first instance struck it out, but on appeal the Court of Appeal held that it was arguable that the police had owed the claimant a duty: (i) to take reasonable steps to assess whether he was a victim of crime and then to accord him appropriate protection, support, assistance and treatment; (ii) to take reasonable steps to afford him the protection, assistance and support commonly afforded to a key eye witness to a serious crime of violence; and (iii) to afford reasonable weight to the account of events that he gave and to act upon it accordingly. The defendants appealed, and the House of Lords allowed the appeal.

[28.7] The weight of authority was clearly against the claimant. In the leading case, *Hill v Chief Constable of West Yorkshire* [1988] 2 All ER 238, the House of Lords had held that individual citizens could not sue the police in respect of their negligent failure to prevent or adequately to investigate criminal conduct. Furthermore, in *Calveley v Chief Constable of the Merseyside Police* [1989] 1 All ER 1025 the House made it clear that the police owed no duty of care to a crime suspect, and in *Elgouzouli-Daf v Comr of Police of the Metropolis* [1995] 1 All ER 833 the Court of Appeal held that the Crown Prosecution Service owed no duty of care to persons it prosecuted. Lord Steyn, who gave the leading opinion in *Brooks*, was in no doubt that the core principle of the *Hill* case remained good law. A retreat from that principle would, he said, have detrimental effects on law enforcement. If the duty the claimant was arguing for were to be recognised, for example, then while focusing on investigating crime, and the arrest of suspects, 'police officers would in practice be required to ensure that in every contact with a potential witness or a potential victim time and resources were deployed to avoid the risk of causing harm or offence' ([2005] 2 All ER 489 at [30]). This in turn would impede the ability of the police to perform their public functions in the interests of the community, fearlessly and with despatch, and would result in an unduly defensive approach to the combating of crime. Nor did his Lordship believe that *Hill* could be distinguished in this case, since the three duties of care the claimant was arguing for were inextricably bound up with the police function of investigating crime which lay at the heart of the earlier decision. He did, however, give future claimants a glimmer of hope by commenting that, with hindsight, not every observation in the *Hill* case could now be supported, and by making it clear that cases involving an assumption of responsibility by the police fell outside the scope of that decision. Similarly, Lord Bingham was 'reluctant to indorse the full breadth of what [*Hill*] has been thought to lay down' (at [3]), and Lord Nicholls said that the decision in *Hill* ought not to stand in the way of granting an appropriate remedy in an exceptional case.

[28.8] The other two duty of care cases reported this year were decisions of the Court of Appeal. In last year's Review we discussed *Customs and Excise Comrs v Barclays Bank plc* [2004] EWHC 122 (Comm), [2004] 2 All ER 789, [2004] 1 All ER (Comm) 960 (All ER Rev 2004 at [28.11]), where Colman J held that a bank served with a freezing order prohibiting the disposal of a client's funds did not owe a duty of care to the party which had obtained the order to prevent payments out of the client's account, unless by its conduct it had objectively assumed a responsibility to that party. Now the Court of Appeal has overturned that decision, and held that the bank in question, which had permitted transfers of substantial sums from accounts covered by freezing orders obtained by the Customs and Excise Commissioners, must compensate the Commissioners for the money they lost as a result ([2004] EWCA Civ 1555, [2005] 3 All ER 852).

[28.9] Confusingly, the court chose to run through three different ‘tests’ for the existence of a duty of care, which Longmore LJ referred to as the ‘threefold’ test (of foreseeability, proximity, and fair, just and reasonableness), the ‘assumption of responsibility’ test and the ‘incremental’ test – this despite the fact that, if applied correctly, apparently all three tests yield the same result! This unnecessarily complex approach served to obscure the fact that the harm suffered by the Commissioners was economic loss, and to deflect the court from the central question before it, which was whether there was anything in the circumstances to justify displacing the general no-recovery rule applicable in economic loss cases. The easiest way of displacing that general rule is to establish that the defendant assumed a responsibility towards the claimant, but there was nothing on the facts to justify such a conclusion. It may be, therefore, that the decision was simply wrong, but their Lordships did identify a couple of good reasons for creating an additional exception to the no-recovery rule in these circumstances.

[28.10] One was the pragmatic argument that the absence of a duty of care would undermine the effectiveness of freezing orders, since a bank would have no incentive to take care to see that it complied with the order, except in so far as a deliberate or (possibly) a reckless breach of the order would expose it to proceedings for contempt. The other good reason for not applying the general rule in this case was a more principled one, concerning the nature of the relationship between the bank and the Commissioners. Banks affected by freezing orders are entitled to have their associated costs reimbursed by the party that obtained the order, and the defendant bank was – like most banks, one assumes – in the habit of sending such parties a pro forma letter reminding them of this fact, and enclosing a schedule of the work typically involved. As Lindsay J pointed out (at [53]), the entitlement to recompense, and the accompanying procedure employed by the bank, went some way towards establishing the ‘proximity’ between the parties necessary to ground a duty of care (a ‘proximity’ generally absent in economic loss cases). Indeed, Peter Gibson LJ went so far as to suggest (at [61]) that it lent the relationship between the bank and the Commissioners an almost contractual flavour. Perhaps, then, the decision to impose a duty of care was justified after all, but it must be said that for the most part the reasoning employed to reach that decision left a great deal to be desired. (See also [3.6], [19.18] above for discussion of this case.)

[28.11] The other Court of Appeal decision on duty reported this year was *Carty v Croydon London Borough Council* [2005] EWCA Civ 19, [2005] 2 All ER 517. The claimant brought proceedings for damages against the defendant local education authority on the grounds that it had breached its duty of care towards him by failing to provide him with a suitable education. Gibbs J held that the authority had not been negligent, and dismissed the claim. The claimant appealed on the breach issue, and the defendant authority countered by denying that in the circumstances

they had owed the claimant a duty of care. Dyson LJ, who gave the leading judgment, dealt with the duty issue first. The specific duty question before the court was whether a local authority education officer could be liable in negligence to a child with special educational needs. The House of Lords had held in *Phelps v London Borough of Hillingdon* [2000] 4 All ER 504 that educational professionals – such as teachers and educational psychologists – owed a duty of care to such children, and that a local educational authority could be vicariously liable for breaches of it. However, the defendant authority argued that *Phelps* did not apply in this case, for two reasons. The first reason was that the alleged negligence of the education officer concerned the making and reviewing of a statement of special educational needs under the process established by the Education Act 1981, and in *Gorringe v Calderdale Metropolitan BC* [2004] UKHL 15, [2004] 2 All ER 326 the House of Lords had held that a common law duty of care could not be founded simply on the failure of a public authority to perform a statutory duty or power. Dyson LJ acknowledged (at [42]) that it followed from *Gorringe* that the mere fact that an education officer had failed to make a formal assessment of a child's special educational needs could not ground a negligence claim. However, where – as in this case – an education officer had entered into a relationship with, or assumed a responsibility towards, a child, *Gorringe* was not applicable. The authority's second argument was that education officers were administrators, rather than professional persons, and *Phelps* applied only to the latter. The Court of Appeal disagreed. Mummery LJ considered classification as a 'professional' to be 'irrelevant in the present context' (at [85]), and Dyson LJ thought that education officers could be described as professional persons in any case, since the tasks they undertook could only be performed effectively by those with the appropriate skill and expertise – it did not matter that they had no professional qualifications and were not regulated by a professional body. Furthermore, it would be anomalous if teachers, doctors and psychologists involved in the process of reporting and assessment owed a duty of care to the child, but the person who actually made the final decision did not. The court concluded, therefore, that in an appropriate case an education officer could indeed owe a child a duty of care.

[28.12] Turning to the breach issue, Dyson LJ made it clear that it would not be easy to establish negligence in such a case. Echoing earlier authorities, he explained that while the issue of a public authority's 'discretion' would no longer be decisive at the duty stage, it would inform the reasoning of the courts when it came to the question of breach. It followed that, in the light of the nature of the statutory function in question, and of the difficulty of the decisions that had to be made in the field of special education, it would usually only be fair, just and reasonable to impose a duty of care to avoid decisions that were 'plainly and obviously wrong' (at [43]). Applying the principle that the court should pay close attention to the complexity and delicacy of the decisions

in question, and ought not to find negligence too readily, he concluded that in this case the finding of the judge that the allegations of negligence had not been made out had been correct.

Causation

[28.13] In *Gregg v Scott* [2005] UKHL 2, [2005] 4 All ER 812 the House of Lords returned to the difficult question of whether, in a medical negligence case, damages should be available for the loss of the chance of avoiding a particular negative outcome, rather than only for the outcome itself (see also [18.2]–[18.15] above). When the claimant visited the defendant general practitioner about a lump under his arm, the defendant assumed it to be benign, and negligently failed to refer the claimant to a specialist for further investigations. The lump turned out to be cancerous, and the defendant's negligence meant that the start of treatment was delayed for nine months. During that nine months, the cancer had spread, and it was estimated that as a result the claimant's chance of being cured (cure being defined as survival for at least ten years) had been cut from 42% to 25%. The claimant sought damages for the diminution in his prospects attributable to the delay, but both the trial judge and the Court of Appeal dismissed his claim because on the balance of probabilities he would not have survived in any case. By a majority (Lord Nicholls and Lord Hope dissenting) the House of Lords agreed.

[28.14] *Gregg* is a complex and difficult case, and it is impossible to do full justice to it in the space available here. In essence, however, the case for the claimant boiled down to two arguments. The first (the 'quantification' argument) was the contention that the delay had undoubtedly caused *some* physical injury to the claimant, namely the enlargement of the tumour, and that when it came to quantifying the damages for that injury, an award should be made for the effect it had had on the claimant's prospects. The second (the 'loss of a chance' argument) was the contention that even though the claimant could not prove, on the balance of probabilities, that the defendant's negligence had deprived him of a cure, the loss of the chance of that outcome ought itself to be recognised as a form of actionable damage. Lord Hoffmann was not convinced by either argument. The quantification argument was based on the principle that when it came to quantifying the loss likely to have been caused by a defendant's tort, the courts took into account possibilities that fell short of probabilities. But this principle applied only to damage which, if it did come about, would clearly be attributable to the tort; it did not apply in a case like this, where the damage in question (premature death), if it did come about, would probably not be so attributable (at [68]). As for the loss of a chance argument, its full logical implication was that damages should be awarded in all cases in which the defendant might have caused an injury and had increased the likelihood of the injury being suffered. Adhering to this position would require the House to abandon a good deal of authority (including *Hotson v East Berkshire*

Area Health Authority [1987] 2 All ER 909 and *Wilsher v Essex Area Health Authority* [1988] 1 All ER 871), and there were 'no new arguments or change of circumstances which could justify such a radical departure from precedent' (at [85]). Furthermore, although various ways had been suggested of confining a principle of loss of a chance recovery – for example, limiting it to cases where the inability to establish causation arose out of lack of medical knowledge of the causal mechanism, as opposed to lack of knowledge of the facts – the proposed control mechanisms were lacking in principle, and an unprincipled departure from the ordinary balance of probabilities approach to causation should be avoided.

[28.15] Lord Phillips agreed that the appeal should be dismissed. Close analysis of the difficulties surrounding the statistical evidence relied on in the case only served to illustrate that the exercise of assessing the loss of a chance in a clinical negligence case was a difficult one. By contrast, establishing the consequences of a doctor's negligence on the balance of probabilities was likely to be very much easier. This practical consideration was a policy reason for rejecting the loss of a chance approach, since a 'robust test which produces rough justice may be preferable to a test that on occasion will be difficult, if not impossible, to apply with confidence in practice' (at [170]). Baroness Hale arrived at the same conclusion, though not without regret. She agreed with Lord Hoffmann that the quantification argument failed, since consequential loss still had to be caused by the injury for which the defendant was responsible, and here it could not be shown that the claimant's reduced prospect of survival was, on the balance of probabilities, caused by the enlargement of the tumour. Whether the loss of a chance argument should be accepted was a matter of legal policy, and in the end she concluded that the case for change had not been made out. In particular, she was concerned that it would be unjust if claimants were given a free choice as to whether to formulate the damage as the loss of the chance of a positive outcome, or the loss of the outcome itself, since this would mean that in cases where the balance of probabilities test was satisfied, they would recover full damages, and in cases where it was not they would still recover proportionate damages. And yet if proportionate recovery were introduced across the board, that would 'surely be a case of two steps forward, three steps back for the great majority of straightforward personal injury cases' (at [225]). Besides, proportionate recovery would add considerably to the complexity of the issues to be resolved, and this would make settlements and trials much more difficult. All in all, the problems to which acceptance of the loss of a chance approach would give rise outweighed any policy advantages it would bring.

[28.16] Lord Nicholls, dissenting, was not swayed by the quantification argument, which he felt did not get to the heart of the problem. The fundamental issue raised by the appeal was whether to accept the loss of a

chance argument. And while there was logical force in the contention that a statistical chance had no value, and hence that the loss of such a chance ought not to be compensated, in suitable cases (for example, *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2002] 3 All ER 305) the courts had shown that they were prepared to adapt their process so as to leap an evidentiary gap when overall justice plainly so required (at [31]). This was not appropriate in cases (such as *Hotson*) where the patient's actual condition at the time of the negligence was determinative of the answer to the hypothetical 'but-for' test of causation, but it was appropriate in less straightforward cases, where the limitations on scientific and medical knowledge meant that a full identification of the patient's condition at the time of the breach of duty would not necessarily provide such an answer. And the present case was of the latter kind, since identifying the nature and extent of the claimant's cancer at the time of the mistaken diagnosis would not provide a simple answer to the question of what the outcome would have been if he had been treated promptly. The way ahead, his Lordship believed, was 'to recognise that where a patient is suffering from illness or injury and his prospects of recovery are attended with a significant degree of medical uncertainty, and he suffers a significant diminution of his prospects of recovery by reason of medical negligence ... that diminution constitutes actionable damage' (at [44]). Lord Hope agreed with Lord Nicholls that the appeal should be allowed, but his reasoning was influenced more by the quantification argument, which he appeared to accept (without, it must be said, dealing with the objections raised by the majority). His Lordship made it clear, however, that he also accepted the loss of a chance argument, since he said that, even if no physical injury had resulted from the delay in diagnosis, the reduction in the claimant's prospects of recovery brought about by the doctor's negligence should have afforded him a cause of action (at [121]).

[28.17] One final point can be made. In earlier 'loss of a chance' cases, such as *Hotson*, medical negligence had increased the probability of an adverse outcome, and that outcome had then come about. *Gregg* was not such a case, however, for the claimant was still alive. What is more, Lord Phillips specifically left open (at [190]) the question of whether proportionate recovery would be appropriate in the former type of case, a remark which might be taken to indicate that *Gregg* has not altogether shut the door on claims for loss of a chance. On the other hand, no such reservations were apparent in the opinions of Lord Hoffmann and Lady Hale, and the powerful arguments which they put forward for rejection of the loss of a chance argument in this case appear to us to be equally valid in situations where the adverse outcome has in fact materialised.

[28.18] In *Barker v Saint-Gobain Pipelines plc* [2004] EWCA Civ 545, [2005] 3 All ER 661 the Court of Appeal was called upon to decide two issues arising out of the decision in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22, [2002] 3 All ER 305 (All ER Rev 2002 at [27.1]–[27.8]). In *Fairchild*, the House of Lords held that if an employee

was negligently exposed to asbestos dust by different employers during different periods of employment, and subsequently developed mesothelioma as a result of that exposure, he need not establish on the balance of probabilities that his condition was attributable to the negligence of a particular employer in order to recover damages: it was sufficient for him to show that the negligence of the employer in question had significantly increased the risk of his contracting the disease. The issues in *Barker* were: (1) whether the *Fairchild* principle applied if one element of the claimant's overall exposure to asbestos came about through a period of self-employment; and (2) whether, if liability were imposed on an employer under the *Fairchild* principle, he was entitled to an apportionment of his liability to reflect the extent of the overall exposure for which he was responsible. The Court of Appeal answered 'yes' to the first question, and 'no' to the second, just as Moses J had done at first instance.

[28.19] The solution to the self-employment issue depends on the rationale of the *Fairchild* principle. The defendant in *Barker* argued that the rationale was that it would be manifestly unjust if a claimant were to be left without a remedy in circumstances where (as in *Fairchild* itself) it was clear that the claimant had suffered a legal wrong, but it was unclear which of a number of negligent parties was responsible. Although there were certainly statements in *Fairchild* which were consistent with this rationale (see, for example, [2002] 3 All ER 305 at [23] per Lord Bingham), the Court of Appeal in *Barker* thought it too narrow an interpretation of that case, for two main reasons. The first was that the House of Lords had emphasised the so-called 'empty duty' argument, the argument that application of the orthodox causation rules in multiple-employer cases would empty the duty to protect employees against mesothelioma of all content. And, as Kay LJ pointed out in *Barker* (at [38]), this argument applied with equal force where the other source of exposure was not employment with another, but a period of self-employment. The other reason the court gave for rejecting the narrow interpretation of *Fairchild* was that it was inconsistent with *McGhee v National Coal Board* [1972] 3 All ER 1008, a decision approved by the House of Lords in *Fairchild*. This was because in *McGhee* the alternative source of exposure to the brick dust which caused the claimant's dermatitis was not the negligence of a third party, but the non-negligent conduct of the defendant. Keene LJ concluded that it could not therefore be a pre-condition of liability under the *Fairchild* principle 'that the injury must have been caused by someone's tortious act' (at [50]). It followed that exposure during a period of self-employment was no bar to reliance on the *Fairchild* principle, although any blameworthiness on the claimant's part would result in a reduction of his damages for contributory negligence.

[28.20] It was perhaps surprising that the apportionment issue was not dealt with in the *Fairchild* case itself, as it was obviously an issue which

would have to be resolved sooner rather than later. In *Barker* the Court of Appeal resolved it by holding that in such cases there was no sufficient reason for departing from the well-established rule that if a claimant had suffered a single indivisible injury then two concurrent tortfeasors would each be jointly and severally liable. Where another employer had contributed to the risk of the claimant contracting mesothelioma, the defendant could seek contribution, and while of course there was a risk that the defendant would be unable to recover contribution from a firm that had become insolvent or untraceable, it was the general policy of the law that that risk should be borne by the solvent wrongdoer rather than the blameless victim. And that policy applied even where it could not be shown on the balance of probabilities that the defendant had been causally responsible for the harm in the first place.

Libel and slander

[28.21] The decision of the Court of Appeal in *Jameel v Wall Street Journal Europe SPRL* [2005] EWCA Civ 74, [2005] 4 All ER 356 raises several issues of importance for the law of defamation. The Wall Street Journal published an article in 2002 that identified the claimant's group of companies as being among those being monitored by the Saudi Arabian authorities at the request of the US government. In a claim brought by Jameel and the main company in the group, the defendants advanced a *Reynolds* qualified privilege defence (*Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609), arguing that the essence of that defence was whether the publisher had exercised 'responsible journalism'. They also challenged the principle that a claimant in a libel action did not have to allege or prove special damage in order to establish a cause of action, on the ground that, in so far as it related to corporations, or alternatively foreign corporations, it infringed the right to freedom of expression in art 10 of the European Convention on Human Rights. The action was tried before a jury and in answer to a series of questions put to them by the judge, the jury found that the words bore a meaning defamatory of the claimant. They also did not accept the journalist's account of his attempts to verify the story and his explanation of his attempts to contact the claimant. Subject to the defence of qualified privilege, the jury awarded £30,000 to Jameel and £10,000 to the company. On the basis of the jury's findings, Eady J rejected the defence of qualified privilege. He also rejected the defendant's argument that proof of special damage was necessary where the claim was brought by a corporation. The defendant appealed.

[28.22] Lord Phillips MR gave the judgment of the Court of Appeal dismissing the appeals. So far as the defence of qualified privilege was concerned, his Lordship held that Eady J had been correct to reject the simple test of 'responsible journalism' as constituting the essence of the *Reynolds* defence. The primary question in determining whether *Reynolds* privilege applied was 'whether the particular circumstances gave rise to a duty to publish'. The question of whether there had been responsible

journalism was a matter to be addressed when answering that primary question but the primary question could only be answered by asking whether there was a social or moral duty to publish and a corresponding public interest in the words being published. As Lord Phillips explained (at [87]):

‘We agree with the judge that the phrase responsible journalism is insufficiently precise to constitute the sole test for *Reynolds* privilege. It seems to us that it denotes the degree of care that a journalist should exercise before publishing a defamatory statement. The requirements of responsible journalism will vary according to the particular circumstances and, in particular, the gravity of the defamation. Responsible journalism must be demonstrated before *Reynolds* privilege can be established. But there is a further element that must be demonstrated. The subject matter of the publication must be of such a nature that it is in the public interest that it should be published. This is a more stringent test than that the public should be interested in receiving the information.’

[28.23] Having identified the essence of the test, the Court of Appeal did not find it necessary to deal with the defendant’s argument that Eady J’s refinement of the test was too stringent. The Court of Appeal accepted that Eady J had approached the question of whether the privilege applied by asking ‘whether the defendant had an *obligation* to publish the article and whether the public had a *need* to have the information contained in it in the sense that it would be *wrong to deprive the public of it*’ (at [85]). But even accepting, contrary to the judge’s finding, that publication of the article would have been in the public interest, the court held that the jury’s rejection of the journalist’s evidence that he had properly sourced the article and sought Jameel’s comments before publication was fatal to the defendant’s case that they had satisfied the test of responsible journalism (at [88]).

[28.24] The Court of Appeal also rejected the defendant’s argument, based on the decision of the Privy Council in *Bonnick v Morris* [2002] UKPC 31, [2002] All ER (D) 92 (Jun), that because the journalist reasonably did not consider that the article bore a defamatory meaning, publication of the article constituted responsible journalism. It was true that in *Bonnick* the Privy Council had concluded that where there was doubt about what an article meant or there were several possible meanings, the fact that the journalist reasonably believed that a reasonable reader would draw a non-defamatory meaning from the article meant that publication constituted responsible journalism. Further, Lord Phillips accepted that Eady J had been wrong to conclude that *Bonnick’s* case could only apply where a publication bore alternative meanings each of which was defamatory. Indeed in *Bonnick’s* case itself, it seems that the defendant had given evidence that she did not appreciate that her article had a defamatory meaning and the Privy Council considered that she could be forgiven for this and had not acted irresponsibly in publishing the article. However, even accepting that

Bonnick represented the law in England – and on this point the court reached no conclusion – *Bonnick* provided no defence where, as here, no reasonable journalist could have ignored the fact that the article was capable of bearing a defamatory meaning (at [96]–[97]).

[28.25] The Court of Appeal also rejected the defendant's argument that in order for a corporation to establish a cause of action in libel it had to prove special damage. The well-established principle of English law that a corporation can sue for libel without proof of special damage had not been swept away by art 10 of the ECHR. Not only was there high authority binding on the court to the effect that there was no incompatibility between the principles of the English law of defamation and the Convention in this regard (*Derbyshire County Council v Times Newspapers Ltd* [1993] 1 All ER 1011), but requiring a corporation to prove special damage to establish a cause of action in libel would not produce a fairer balance between the freedom of the press and protection of individual reputation. As Lord Phillips explained (at [113]):

'The difficulty that a trading corporation will often have in proving that a defamation calculated to cause damage to its trading reputation has resulted in specific financial loss is obvious ... [Eady J] pointed out that an important object of the law of defamation is to provide a means for those defamed to achieve vindication. A requirement to prove special damage would leave many an injured corporation without remedy. We agree. We do not consider that such a requirement would go far enough to provide necessary protection for the reputation of corporations that are at risk of being damaged by inaccurate press reports.'

[28.26] Moreover, there was no justification for drawing a distinction between UK and foreign corporations. As the court pointed out, it is likely that a foreign corporation that trades outside the jurisdiction will have difficulty in establishing that it has a trading reputation within the jurisdiction. However, if it can do so, the interests of justice require that the same principles of law should apply to its claim. Indeed, to treat it differently might well constitute discrimination in the accordance of art 6 rights contrary to the prohibition imposed by art 14 of the Convention.

[28.27] *Buchanan v Jennings* [2004] UKPC 36, [2005] 2 All ER 273, an appeal to the Privy Council from the New Zealand Court of Appeal, raised an interesting point concerning the scope of the absolute privilege that applies to proceedings in Parliament. The defendant in *Buchanan* was a member of the New Zealand House of Representatives and in the course of a parliamentary debate he made defamatory statements about the claimant. Some two months later, an interview with the defendant was published in which he stated that he did not resile from the claim he had made in the House. He did not, however, repeat what he had said in the House. The claimant issued proceedings for defamation, pleading the defendant's words used in the course of the debate. The defendant admitted that he had used the words attributed to him in the House, but

argued that the words in question had been spoken under the protection of parliamentary privilege and that the claim against him infringed the protection given to him by art 9 of the Bill of Rights (1688), which provided that the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside of Parliament. The defence of absolute privilege was rejected by the trial judge and by the majority of the Court of Appeal of New Zealand. The defendant appealed to the Privy Council. The Solicitor General of New Zealand, accepting that there was no distinction between English and New Zealand law on this question, contended, *inter alia*, that the defendant had not repeated his parliamentary statement, but had confirmed it by reference only, and that it was therefore necessary for the claimant to rely on what the defendant had said in the House, so infringing the protection afforded by art 9.

[28.28] The Privy Council rejected the Solicitor General's argument and dismissed the claimant's appeal. Where, as here, a Member of Parliament affirmed outside Parliament a statement that he had previously made within Parliament he could be liable in defamation. Their Lordships recognised that art 9 of the Bill of Rights prevented reference to anything said or done in Parliament in order to question or impeach what had been said or done there. However, according to Lord Bingham (at [18]):

'In a case such as the present ... reference is made to the parliamentary record only to prove the historical fact that certain words were uttered. The claim is founded on the later extra-parliamentary statement. The propriety of the member's behaviour as a parliamentarian will not be in issue. Nor will his state of mind, motive or intention when saying what he did in Parliament. The situation is analogous with that where a member repeats outside the House, *in extenso*, a statement previously made in the House. The claim will be directed solely to the extra-parliamentary re-publication, for which the parliamentary record will supply only the text.'

[28.29] While this was undoubtedly a finely balanced case, it is suggested that the Privy Council was right to decide as it did. Such authority as existed favoured this solution (*Laurance v Katter* (1996) 141 ALR 447) and the view taken by the Privy Council was the same as that which had been taken on this issue by the Faulks Committee (*Report of the Committee on Defamation* chaired by Faulks J (Cmd 5909) (1975), paras 204–205). However, it should be noted that the decision has been the subject of significant adverse comment in New Zealand. Having stated their dissatisfaction with the decision, the Privileges Committee of the House of Representatives noted that:

'One of the principal aims of Parliament's freedom of speech, acknowledged by the courts as much as by Parliament itself, is to avoid the courts being drawn into examining and making judgments on parliamentary proceedings. There is a longstanding principle of mutual restraint between the courts and the legislature whereby one does not interfere in the work of the other ... There is a grave danger of this principle breaking down in a case of

“effective repetition”. In defamation a plaintiff is alleging that false statements have been published with an intent to defame. Certainly if a member repeats a parliamentary statement outside the House it is no protection against the liability that a finding of defamation is tantamount to a finding that the member on the earlier occasion spoke falsely in the House. That may be an inevitable, though unexpressed, conclusion. But in an “effective repetition” case the parliamentary statements are being put directly to the court because they are the only or the main evidence of the defamation. In these circumstances the principle of mutual restraint breaks down completely, as the court directly judges the quality of the parliamentary proceedings. This has major implications for the relationship between the legislature and the courts.’ (*Questions of Privilege Referred 21st July 1998 Concerning Buchanan v Jennings – Report of Privileges Committee, May 2005*, at 5)

[28.30] In its Report, the Privileges Committee has recommended a statutory reversal of *Buchanan* for all potential legal purposes, and not just for defamation. Under this approach no liability could arise except in respect of words actually spoken outside the House. It would not be possible to impose legal liability by adding a parliamentary statement to a statement made outside the House. We shall have to see if a similar legislative reform is suggested in this country.

[28.31] Two cases were reported in 2005 on the offer of amends defence contained in ss 2–4 of the Defamation Act 1996. The central idea behind this defence is to give a defendant who has mistakenly defamed someone the opportunity to avoid prolonged and expensive litigation provided he is prepared to acknowledge the wrong and is willing to make reasonable amends. This defence is of course not new. A statutory defence was available from 1952 (under s 4 of the Defamation Act 1952) to any defendant who had published defamatory matter but could prove that he had not intended to do so, and was prepared to offer a correction and apology by way of amends. However, the s 4 defence was rarely used in practice, in large part because the procedure that had to be followed was both cumbersome and demanding, imposing as it did on the defendant the difficult task of proving his innocence. The new provisions contained in the Defamation Act 1996 (the background to which is to be found in chapter VII of the Neill Committee Report on Practice and Procedure in Defamation), were intended to breathe new life into the defence by acting as a deterrent to ‘the small minority of claimants who wished to proceed to trial for purely financial reasons’, while at the same time offering a relatively inexpensive way out for those who were prepared to acknowledge their wrong and make reasonable amends. After a relatively slow start – when it appeared that few defendants were prepared to risk relying on the defence – a number of cases have reached the courts on aspects of the defence, and defamation practitioners have indicated to us that the defence is now being used quite frequently. There is clearly a growing perception that there is much to be gained by relying on the

defence where possible, and the two cases reported last year are, if anything, likely to make use of the defence even more attractive.

[28.32] In the first of the two cases, *Milne v Express Newspapers Ltd* [2004] EWCA Civ 664, [2005] 1 All ER 1021, the Court of Appeal was asked, inter alia, to determine the meaning of 'reason to believe' in s 4(3) of the Act. The question is an important one because the defence can be defeated where it can be shown that the defendant knew 'or had reason to believe' that the statement complained of was not true. It was not contended in *Milne* that the defendant knew that his statement was false. However, the claimant argued that the judge had been wrong in interpreting s 4(3) as importing a wholly subjective recklessness or bad faith test of the kind required for the proof of malice in defamation (ie a lack of belief in the truth or a reckless indifference as to the truth or falsity of the words complained of). Properly construed, the provision meant that the defence would be defeated where it could be shown that a reasonable person with the knowledge of the defendant ought to have known the statement was untrue. In other words, the words 'reason to believe' imported a partly subjective and partly objective test.

[28.33] The Court of Appeal rejected the claimant's argument. So far as the test suggested by the claimant was concerned, the court doubted whether in fact there was likely to be any difference in practice between it and the subjective recklessness test proposed by the defendant (at [47]). However, even if there was a difference, the test suggested by the claimant was the wrong one. Although the language used in the provision did not precisely follow the recommendations of the Neill Committee, there was no indication that Parliament had intended to do other than to implement those recommendations, which had been designed to produce a defence defeasible only by proof of bad faith or recklessness. As May LJ, who delivered the judgment of the court, explained:

'There is ... a powerful reason why the words in question should be construed as importing recklessness ... If a claimant establishes malice on the part of a person who publishes a defamatory statement, he has the basis for a claim of aggravated, and possibly exemplary, damages. [Counsel for the claimant] accepted that, malice apart, compensation can be fully assessed and awarded under s 3(5) of the 1996 Act. There would be little point therefore in relying on s 4(3), unless the requirement there was to establish malice. Recognising that some claimants might prefer a jury trial cannot alone have been the parliamentary purpose.' (at [49])

[28.34] In the second case, *Nail v News Group Newspapers Ltd* [2004] EWCA Civ 1708, [2005] 1 All ER 1040, the defendant had made agreed apologies to the claimant under the offer of amends procedure. The matter then came before a judge to assess compensation under s 3(5) of the 1996 Act, which provides that if the parties do not agree on the amount payable by way of compensation, damages are to be determined 'on the same principles as damages in defamation proceedings'. The judge

stated that the adoption of the conciliatory process provided by the offer of amends regime had a major deflationary effect on the appropriate level of compensation and therefore reduced the damages that he would have awarded had the matter gone to trial by 50%. The claimant appealed, contending that the effect of the judge's decision was to penalise him for being conciliatory. This cannot have been the intention of the drafters and the claimant should therefore receive full compensation, without a discount.

[28.35] The Court of Appeal dismissed the claimant's appeal. In determining compensation under s 3(5) of the Act, the court was required to take account of matters which it would take account of under the general law (at [36]). While their Lordships noted that the court must be careful not to drive down damages in libel cases to a level at which publishers might with equanimity be tempted to risk having to pay, it was certainly the case that 'if an early and unqualified offer to make amends is made and accepted and an agreed apology is published ... there is bound to be substantial mitigation' (at [41], per May LJ). Precisely how 'healthy' a discount will depend upon the facts of each case, but in *Nail* the Court of Appeal refused to disturb the 50% discount applied by the judge. It seems fairly clear, therefore, that provided the apology is suitably fulsome, made swiftly and in as prominent a place as the offending statement, the discount is likely to be significant. It should be noted, however, that even where an apology is made somewhat belatedly, the courts have continued to apply substantial discounts to those who use the offer of amends procedure (see *Campbell-James v Guardian Media Group plc* [2005] EWHC 893 (QB), [2005] All ER (D) 161 (May), where the damages were discounted by 35% even though the judge found that there had been an unaccountable delay in acknowledging the mistake and dismissive references made to qualified privilege and fair comment).

Damages

[28.36] In last year's Review, we commented favourably on the refusal by Davis J in *Page v Plymouth Hospitals NHS Trust* [2004] EWHC 1154 (QB), [2004] 3 All ER 367 (All ER Rev 2004 at [28.50]–[28.51]) to allow the claimant to recover as part of his damages a sum representing the predicted costs of investment advice and fund management charges to be incurred in the management of the damages awarded. As the judge correctly pointed out, the calculation of damages for future pecuniary loss is made assuming that the lump sum awarded will be invested and that the rate of return obtainable will be equivalent to that obtainable by investment in index linked government stock (ILGS). If one makes this assumption the need for any active investment management is, in effect, removed and it would therefore be wrong to allow the claimant to recover the costs for such service. If, as is the usual case, the claimant wishes to try to obtain a higher rate of return by investing in a mixed portfolio of gilts and equities, that is of course his right: a claimant is entitled to use his

money as he likes. But what he cannot do is to compel the defendant to pay the costs of taking the advice necessary to invest more widely, in the hope that by so doing he will gain more than if the investment had been maintained in ILGS.

[28.37] *Eagle v Chambers* [2004] EWCA Civ 1033, [2005] 1 All ER 136 raised an almost identical point to that in *Page*, save that the claimant in *Eagle* was a patient under the Court of Protection, while the claimant in *Page* was not. The question for the Court of Appeal was whether the rule preventing the recovery of investment management fees was applied to patients as well as to non-patients. The claimant argued that the two classes of claimant should be treated differently. Unlike an 'ordinary' claimant, a patient under the protection of the court has no choice about how the lump sum awarded will be invested, and he will therefore be charged panel brokers' fees in respect of investment advice, whether he likes it or not. This state of affairs having been 'forced' on him by the defendant, the fees should be recoverable.

[28.38] Notwithstanding the superficial attractiveness of the claimant's argument, it is submitted that the majority was correct to conclude that the fees could not be recovered. As Waller LJ pointed out (at [95]), as a matter of principle:

'A defendant must pay by way of compensation damages assessed on the basis that the return on the money will be by way of investment in gilts even though the practice is to gain a higher return by investing more broadly. To order the defendant to pay the costs of taking the advice so as to enable the investment to be made more broadly so as to enable the claimant to recover more than that which he would have recovered if investments had been maintained in gilts is to make the defendant lose both on the swings and the roundabouts, and to provide the claimant with a head of damage which flows from a decision as to how to invest and not from the accident.'

[28.39] All this is as true of a claimant who is a patient as it is of a claimant who is not a patient. While it is true that the claimant who is a patient has no choice as to how the funds are invested, the fact that panel brokers' fees are charged is because of a decision by the Court of Protection to invest more widely than ILGS. Thus, it is because of the decision to invest more widely that the fees are payable and not, as the claimant had argued, because the claimant is a patient. To order the defendant to pay these fees would therefore over-compensate the claimant.

[28.40] *Eagle v Chambers* also raised a separate point concerning the meaning of s 17 of the Social Security (Recovery of Benefits) Act 1997. Section 17 requires courts to disregard the amount of any listed benefits likely to be paid when assessing damages in respect of any accident. In *Eagle*, the claimant had been receiving, and would continue to receive in the future, a mobility allowance, a listed benefit under the 1997 Act. At trial, she sought to recover as part of her damages compensation for

future loss of mobility. The judge held that damages were recoverable but awarded less than the claimant had claimed because, he said, the claimant was obliged to mitigate her loss by using her mobility allowance to invest in a scheme, only available to those in receipt of a mobility allowance, which would provide her with less costly transport than the scheme for which she was claiming damages.

[28.41] The claimant appealed on the ground that, while the judge's decision accorded with the ordinary rules of mitigation, such an approach was precluded by s 17. The Court of Appeal allowed the appeal. A rule as to mitigation can only be said, according to the court, to be a rule relating to the assessment of damages. Only by putting a strained or narrow construction on the provision could a different conclusion be reached, and authority (for example, *Wisely v John Fulton (Plumbers) Ltd*, *Wadey v Surrey County Council* [2000] 2 All ER 545) did not support adoption of such a construction. Thus, the trial judge had been wrong to take account of the benefit payable in assessing damages.

[28.42] While the judgment of the court on this point cannot be faulted from a technical point of view, it is of course the case that the effect of the decision is that the claimant will be over-compensated. Not only will she get her mobility allowance courtesy of the taxpayer but she will also receive damages for loss of mobility calculated on the basis that she will not receive any such allowance. Such a conclusion is not, in our view, justifiable, and s 17 should therefore be amended to make clear that benefits received should be taken into account in so far as they mitigate any loss suffered by the claimant but not otherwise.

[28.43] In cases involving claimants who require residential care and accommodation, the question of who pays for that care and accommodation is obviously of great importance. The amount required to provide long-term care for a seriously injured claimant is likely to be substantial and therefore it is unsurprising that defendants will, wherever possible, seek to avoid having to pay some or all of the cost. While it is of course the case that as far as *medical* expenses are concerned, the fact that the claimant could have taken advantage of services provided by the NHS is to be ignored (Law Reform (Personal Injuries) Act 1948, s 2(4)), no such rule exists in respect of care expenses. The predictable issue that arises in many high-value claims is consequently whether or not the care being provided by a local authority is adequate to meet the claimant's reasonable needs. To the extent that the local authority appropriately meets the claimant's care and accommodation needs, there will be no financial loss to the claimant recoverable from the defendant. However, where the care is not adequate and the claimant will reasonably incur private care costs, these are recoverable.

[28.44] In late 2004, the Court of Appeal heard two conjoined appeals (*Sowden v Lodge*; *Crookdale v Drury* [2004] EWCA Civ 1370, [2005] 1 All ER 581) in which this issue arose. Both claimants had suffered

extremely serious head injuries, necessitating a high degree of care for the future. In *Sowden*, the trial judge had determined that local authority provision would generally be adequate, but he awarded a 'top-up' sum in respect of additional care that he found the claimant would require for a significant part of the day. In *Crookdale*, the judge found that private care was reasonably required and he therefore assessed damages on that basis. The broad issue in both cases was whether the judges' assessments of the evidence had been correct, and much of the judgment was therefore concerned with the question of whether, on the evidence, the trial judges had arrived at the correct conclusions. Since the appeals were concerned more with findings of fact than with findings of law, there is little of general significance in the decision of the Court of Appeal. However, three important points can be distilled from the judgments.

[28.45] First, in determining whether damages should be awarded for care and accommodation, the test to be applied is whether the care and accommodation proposed and claimed for by the claimant is required to meet the claimant's reasonable needs. The Court of Appeal therefore concluded that the trial judge in *Sowden* had been mistaken in applying a 'best interests' test to determine what was required. Secondly, a finding of contributory negligence against the claimant, which would of course reduce the damages payable and make it less likely that the claimant would use private facilities in the future, should not be taken into account in assessing damages in the first place. As Pill LJ explained (at [79]):

'Damages are to be reduced [under s 1 of the Law Reform (Contributory Negligence) Act 1945] having regard only to the "claimant's share in the responsibility for the damage". That assumes an assessment of the sum recoverable prior to any reduction for contributory negligence ... The reduction takes account of share of responsibility for the damage but not how the damages are likely to be spent.'

[28.46] While the logic of this analysis is impeccable, the practical result is, of course, rather unsatisfactory. By way of example, if, as was the case in *Sowden*, the claimant was found to be 50% at fault, the damages awarded would fall to be reduced by 50%. Inevitably, this would make it impossible for her to afford the care which the judge had indicated was appropriate when assessing damages and so she would be unlikely to spend the money for the purpose for which it was awarded. However, neither of the alternatives – giving the claimant nothing at all, or giving her all the cost of care – is particularly attractive, so it may be that the current, somewhat unsatisfactory, position is in fact the best in all the circumstances.

[28.47] Finally, while it is obviously for the claimant to establish what his reasonable needs are, the court made clear that there is no legal burden on him to prove that provision by the public sector will be inadequate. It is for a defendant who claims that local authority provision is sufficient (or that only 'top-up' care is required) to set this out in clear terms prior to the trial and to argue the point.

[28.48] Apart from these three specific issues, *Sowden* brings into sharp relief the question of how claimants' long-term care should be financed. Prior to the National Assistance (Assessment of Resources) (Amendment) Regulations 1998, a local authority was entitled to look to any of the claimant's resources (including any claim he might have for damages in negligence) in order to recoup the cost of care provided. Thus, the cost of care was funded via insurance premiums. However, under the regulations, claimants are now able to ring-fence damages awards which are administered via the Court of Protection or within a 'Personal Injury Trust' and so to avoid recoupment. Defendants have used this legislation to argue, successfully, that a claimant cannot recover as damages the cost of care provided by a local authority, on the basis that the claimant has not and will not in fact incur any loss. Whilst this argument was held to be sound in *Sowden*, their Lordships did question whether this was the intention of those enacting the 1998 Regulations. As Longmore LJ pointed out (at [89]):

'I did occasionally wonder during the hearing whether it was really the intention of the draftsman of the 1998 regulations not merely to ring-fence an award of damages, once made, so as to ensure that such award should be unavailable to local authorities providing or paying for care services to a claimant but also to achieve the result that, because no claim to recoup themselves from such an award could be made by local authorities, a defendant tortfeasor was to be under no liability to compensate a claimant for the cost of such care services.'

On the assumption that the current position was probably reached by 'accident', and given that the sums involved are rather large, it is perhaps time that Parliament had another look at this and decided how it thinks long-term care and accommodation should be paid for.

Vicarious liability

[28.49] In *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151, [2005] 4 All ER 1181 the Court of Appeal came to the radical conclusion that more than one employer could be vicariously liable for the negligence of an employee. The owners of a factory suffered serious losses when the factory was flooded as a result of the negligence of a fitter's mate (S) engaged in the installation of an air-conditioning system. S was employed by the third defendants, who had been engaged on a labour-only basis by the second defendants, sub-contractors brought in to carry out the ducting work. At the relevant time, S had been working alongside a fitter also employed by the third defendants, but he had in addition been under the general supervision of a self-employed foreman contracted to the second defendants. In an action by the factory owner, the trial judge found the general employers, the third defendants, vicariously liable, applying the presumption laid down in *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd* [1946] 2 All ER 345. When the third defendants appealed,

the Court of Appeal sought submissions on the permissibility of finding both the second and the third defendants vicariously liable, and in the end that was the course the court decided to take.

[28.50] The most obvious objection to dual vicarious liability was the fact that, since the early nineteenth century, it seems to have been assumed that it was not an option. This assumption was, for example, implicit in the reasoning of the House of Lords in the *Mersey Docks* case. There were also dicta that appeared specifically to rule it out, of which the most influential was the statement of Littledale J in *Laugher v Pointer* (1826) 5 B & C 547 at 558, [1824–34] All ER Rep 368 at 392 that ‘the law does not recognise a several liability in two principals who are unconnected’ (see also *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* and *Shetland Islands Council, The Esso Bernicia* [1989] 1 All ER 37 at 60, per Lord Jauncey). However, after an exhaustive survey of the case law, May LJ concluded that there was no authority which precluded the Court of Appeal from imposing vicarious liability on two defendants in respect of the same tort. Furthermore, the underlying basis for the assumption appeared to be the idea that, to find a temporary employer liable, there had to be a transfer of the contract of employment from the general employer, a notion the artificiality of which had been exposed by Denning LJ in *Denham v Midland Employers’ Mutual Assurance Ltd* [1955] 2 All ER 561. It followed, according to Rix LJ (at [76]), that the doctrine of vicarious liability could properly be invoked against an employer who was ‘not really, in law, the employee’s employer’. And once that point was grasped, there was no logical bar to dual vicarious liability. On the contrary, it was far more sensible to have the option of imposing liability on two employers than to lay down an inflexible rule which forced the courts to make an ‘artificial choice’ between the two (see at [19], per May LJ).

[28.51] That left the question of the basis on which dual vicarious liability would be imposed. For May LJ, the core question was who was entitled, and in theory obliged, so to control the employee as to prevent the negligent conduct. If the answer to that question was each of two ‘employers’, then both would be liable. Moreover, the present case was a clear example of such a situation, since both the fitter employed by the third defendants and the foreman employed by the second defendants had been entitled and (theoretically) obliged to prevent the negligent action of S that caused the flood. Rix LJ agreed that on a control analysis this was a case in which dual liability was appropriate, but he was not convinced that the doctrine of dual vicarious liability should be wholly equated with the issue of control. Instead, he thought it likely that in future cases the courts would look for ‘a situation where the employee in question, at any rate for relevant purposes, is so much a part of the work, business or organisation of both employers that it is just to make both employers answer for his negligence’ (at [79]). This meant, for example, that where an employee was contracted-out labour, responsibility was likely to be shared, whereas if an employee was seconded for a substantial period of

time to the temporary employer to perform a role embedded in that employer's organisation, then it was likely that liability would be imposed on that employer alone.

[28.52] Finally, the court made it clear that in a case of dual vicarious liability, contribution would be available to the employers. However, while in a case of personal liability it was appropriate to consider the relative causative potency and blameworthiness of the parties involved when deciding the amount of recoverable contribution, that was inappropriate in the case of vicarious liability. The absence of personal fault meant that, instead, equal contribution was, in the words of May LJ (at [52]), 'close to a logical necessity'. Rix LJ agreed that an equal split was required, at least in the absence of any personal fault on the part of either employer, and in the absence of any other negligence by another employee.

[28.53] The decision of the Court of Appeal to countenance dual vicarious liability throws up a whole host of issues, not all of which can be considered here. We will confine ourselves to the following three points. The first is that if we accept that the allocation of vicarious liability in temporary employment cases is determined by a test of control, then it does indeed seem illogical to rule out the possibility of dual liability, since there will be situations of dual control. In essence, that was the position taken by May LJ. Less satisfactory, in our view, is the approach taken by Rix LJ. While his Lordship's scepticism about wholesale reliance on a test of control was understandable – particularly in the light of more general trends in the law of vicarious liability since *Mersey Docks* (the leading case on temporary employment) was decided – we would suggest that the kind of 'organisational integration' test he himself put forward lends itself more obviously to an all-or-nothing answer. The second point is that the clear divergence between the two judges who sat in *Viasystems* on the degree of emphasis that should be placed on control in temporary employment cases is bound to produce a great deal of uncertainty. And, finally, we are not convinced that in a case of dual liability an equal split at the contribution stage is indeed a logical necessity, since we would have thought it possible for both employers to have a degree of control, but for one to have more control than the other. It could be that the court intended that in such a situation the employer with the greater degree of control would be made solely liable – a supposition perhaps evidenced by some remarks of Rix LJ at the very end of his judgment – but then that would appear to be almost as arbitrary and illogical as ruling out dual liability in the first place.

Town and Country Planning

PAUL B FAIREST, MA, LL.M

Formerly Professor of Law, University of Hull

Permitted development and mobile telephone masts

[29.1] Mobile telephone masts are frequent, though inert, participants in planning cases, and as such have received due attention in these pages. *R (on the application of Nunn) v First Secretary of State (Leeds City Council and another, interested parties)* [2005] EWCA Civ 101, [2005] 2 All ER 987 features another such mast, again, as it happens, in Yorkshire. This decision of the Court of Appeal also contains a sad warning of the effect of non-observance of the scheme of statutory time limits in permitted development cases, particularly as far as the rights of opponents to the development are concerned.

[29.2] Before setting out the facts of the case, a brief summary of the legal background might be helpful. Though, under the provisions of s 57 of the Town and Country Planning Act 1990 planning permission is generally required for development, there is a category of cases, falling within the General Permitted Development Order (GPDO) where the normal procedure is relaxed. There is a specific provision under the GPDO whereby the construction of a mast under 15 metres in height is permitted development under certain conditions (set out in cl A3). In brief, this sets out a procedure, the salient points of which are as follows:

- (a) The developer must apply to the local planning authority (LPA) for a determination as to whether prior approval must be given relating to the siting and appearance of the mast.
- (b) If the development is not in accordance with development plan, the LPA must give notice of the proposed development by local advertisement, and take into account any representations made to them.
- (c) If such notice is given, then, unless the LPA comes to the view after all that prior approval is not required (and so informs the developer), various possibilities exist:
 - (i) the LPA gives prior approval within 56 days after application for such approval;
 - (ii) the LPA, despite having come to the view that prior approval is required and having so informed the applicant, fails to grant or deny such prior approval within 56 days from the date of application;
 - (iii) the LPA fails to notify the developer within 56 days whether prior approval is required.

In any of these cases, the development may commence.

[29.3] The provision involved in this case was that summarised in (ii) above. T-Mobile, a developer, wished to erect a mobile phone mast in a village near Leeds. Dr Nunn is a resident of that village. Stages (a) and (b) of the procedure set out above were followed and Dr Nunn, who was opposed to the proposal, submitted representations to the LPA, Leeds City Council, within the permitted period. The LPA duly notified T-Mobile that prior approval to siting and appearance would be needed. A few days later, at a meeting, the LPA resolved to refuse approval. At this point things began to go wrong.

What should have happened

[29.4] Within the 56 days from the date of application, the LPA should have informed T-Mobile in writing of the resolution to refuse approval. This would have meant that T-Mobile could have reconsidered its plans, and abandoned or modified them. Alternatively, T-Mobile could have lodged an appeal against the decision under s 78 of the Act. The likely result of such an appeal would have been a local inquiry, at which an inspector could have heard both sides and Dr Nunn would have been able to expand on the points made in her submission to the LPA, and which, one presumes, played their part in inducing the LPA to refuse approval. Dr Nunn might, in the last resort, have failed to convince the inspector, but at least she would have had the opportunity to present her case in the appropriate forum.

What did happen

[29.5] Despite the decision of the LPA, no written notice was sent to T-Mobile until after the 56-day period had expired (though one was sent subsequently). T-Mobile took the lack of a timely notice to be an acknowledgment that they were entitled to go ahead with the permitted development and the erection of the mast, which they duly did. The LPA sought subsequently to recover the position by serving enforcement notices on T-Mobile, alleging a breach of planning control. T-Mobile appealed against the enforcement notices, denying that there had been a breach of planning control and contending that the development fell within the terms of the GPDO. They also contended that, in any event, planning permission ought to be granted. These events resulted in a public inquiry by an inspector appointed by the Secretary of State. The inspector decided to deal with the point about the validity of the enforcement notices first. He accepted T-Mobile's contention that they were not in breach of planning control, so there was no occasion for an enforcement notice. This meant that Dr Nunn's concerns about the impact of the erection of the mast were not addressed at the public inquiry.

[29.6] Dr Nunn now sought permission to apply for judicial review of the inspector's decision. Her claim failed before Collins J, and she appealed to the Court of Appeal. The Court of Appeal dismissed her appeal.

[29.7] Some comments of the Court of Appeal suggest that the difficulties encountered in this case were not new. Waller LJ observed (at [13]) that:

'through a failure by the LPA to serve its determination in time, determinations seeking to refuse approval have been ineffective, and members of the public have been precluded from making representations to an inspector as to the merits of the siting and appearance of mobile phone masts.'

The relevant period had been extended, by amendment of the relevant provision, from its original 28 days to 56 days – but the government had decided to reject the Stewart Report's recommendation that full planning permission should be required for the erection of such masts.

[29.8] Dr Nunn's contentions now went further, and submitted that the effect of the provisions of the GPDO infringed her civil rights under the European Convention for Human Rights and Fundamental Freedoms 1950, as set out in Sch 1 to the Human Rights Act 1998. The relevant provision states 'In the determination of his civil rights ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly ...' (art 6). A public inquiry under the planning legislation would, in her submission, satisfy the Convention's requirements as it would be susceptible to judicial review.

[29.9] The court (per Waller LJ at [22]) accepted that Dr Nunn's human rights had, in the event, indeed been infringed:

'She and others affected had the right to make representations to the LPA on the effects on health and on the appearance of the mast as it affected them and the value of their homes. T-Mobile of course contested that their health could be affected and contested that the appearance affected the value of their homes. Both ... had, under art 6 the right to expect that those points would be determined by the LPA, by an effective decision which might be the subject of an appeal to an inspector, controlled by the court by judicial review ...'

[29.10] The issue of the remedy gave rise to great difficulties. It seems to have been accepted that Dr Nunn might well have a claim for damages against the LPA, or the matter could be referred to the Ombudsman. Dr Nunn sought a remedy against T-Mobile, including possibly the removal of the mast. Waller LJ observed, however, that the scheme and the planning legislation could be operated compatibly with the Convention. The conduct of the LPA, whilst undeniably infringing the rights of Dr Nunn, had at the same time established the rights of

T-Mobile to commence the erection of a mast for which the GPDO grants planning permission. The compatibility of legislation and Convention was also expressly recognised by Laws LJ (at [35]) and Wall LJ (at [42]). The point was neatly summarised by Wall LJ (at [45]):

‘It follows ... and ... the logic is inexorable, that Dr Nunn’s remedy can only sound in damages. Where, as here, the LPA has simply been incompetent, neither the scheme nor any public law remedy provides a mechanism for the revocation of the grant of planning permission. It might be different [if] ... the scheme had been improperly implemented ... T-Mobile [had] behaved unlawfully; but there is no suggestion of that. The law, he said did not offer any remedy other than financial.’

[29.11] Whilst accepting the logic of all the above, one is left with a feeling of regret that there is no more effective remedy, particularly in a case where the rights of local residents to make objections are effectively frustrated by the failure of a LPA to apply the rules correctly. It is difficult to escape the conclusion that the rights of local residents would have been more effectively safeguarded if the Stewart Report’s recommendation that the erection and siting of mobile phone masts should be subject to the full rigours of the Town and Country Planning Act procedures had been implemented.